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Supreme Court of the United States

No. 73-1852

MAURICE M. SAYRE,
Trustee in Bankruptcy of The Liberty
Mortgage Corporation,
Petitioner,

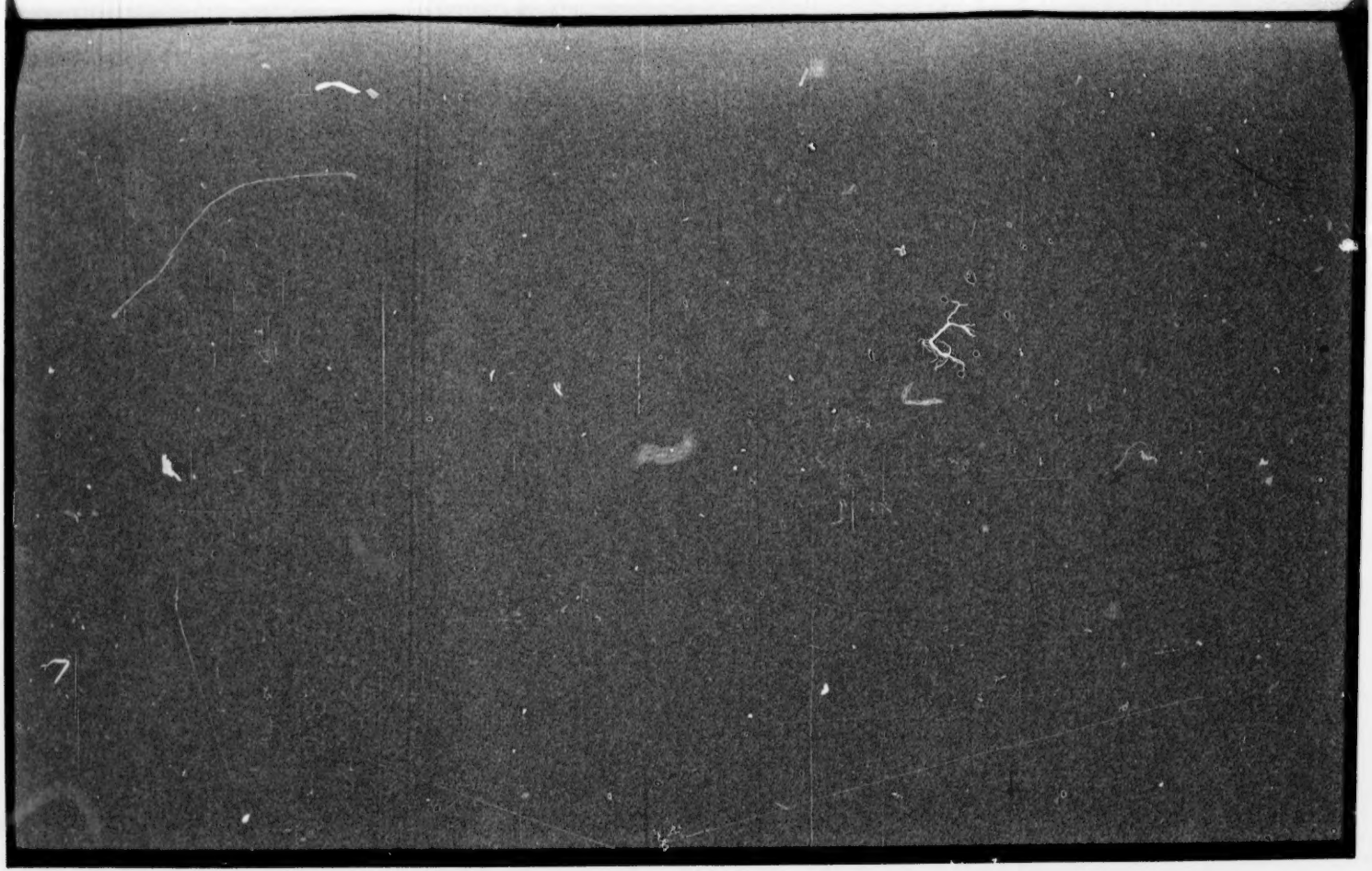
vs.

THE CITY OF CLEVELAND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

EDWIN F. WOODLE
628 Keith Building
Cleveland, Ohio 44115
Counsel for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647



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PETITION FOR A WRIT OF CERTIORARI
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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit reversing an order of the United States District Court for the Northern District of Ohio, Eastern Division, which had overruled in part defendant's motion for summary judgment.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals is as yet unreported. It is set forth in the Appendix,

infra, at p. A50). The memorandum and order of the District Court overruling in part defendant's motion for summary judgment is as yet unreported. It is set forth in the Appendix, *infra*, at p. A35. A prior decision in this case by the District Court overruling defendant's motion to dismiss this case for failure to state a cause of action is reported in 282 Fed. Supp. 175 and is set forth in the Appendix, *infra*, at p. A1.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 14, 1974. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. When, in the execution of a plan for urban renewal, a City engages in a series of willfully wrongful acts and in protracted conduct, the natural and probable consequences of which are known to the City, which improper acts and conduct result in the complete destruction, or the utter uselessness, of real property within the urban renewal area, has the property in effect been taken for public use, and is the owner entitled to payment of compensation therefor?

2. When such acts of a city have effected a de facto taking, is the owner of the property precluded from securing just compensation under the Fifth Amendment to the United States Constitution solely because the City has neither announced its intention to appropriate such property nor engaged in an actual physical invasion thereof?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

"* * * nor shall private property be taken for public use without just compensation."

United States Constitution, Amendment XIV:

"* * * nor shall any state deprive any person of * * * property without due process of law."

STATEMENT OF THE CASE

This is an action by the trustee of a bankrupt corporation seeking to recover just compensation under the Fifth Amendment to the United States Constitution for the de facto taking by the City of Cleveland of a large number of properties of the bankrupt.

On January 27, 1961 the defendant adopted a general neighborhood renewal plan for the blighted east side of the City. The plan encompassed an area of approximately 1633 acres and was to be carried out in a sequence of four successive steps. The first step involved the adoption by the defendant, on June 12, 1961, of the University-Euclid Urban Renewal Plan covering some 853 acres, a huge portion of the City's east side.

At that time plaintiff's bankrupt owned more properties within the urban renewal area than any other property owner, and at the time of the adoption of the plan was still engaged in the process of acquiring additional properties. It then owned total assets substantially in excess of $3,000,000.00, almost all of which was invested in such properties. Seventy-three of the Liberty Mortgage proper-

ties involved in this appeal are located in the Project 1, or first stage, of the University-Euclid Urban Renewal Project.

On November 2, 1964, the Liberty Mortgage Corporation was declared bankrupt, a victim of the acts and conduct of the City of Cleveland described in the complaint in this case. The complaint seeks recovery of compensation for the de facto taking by the City of the bankrupt's properties. That conduct is set forth in detail in the complaint. It consists of numerous acts designated as willful, wrongful and improper, the inevitable consequences of which were well known to the City.

At no time did the City attempt to comply with the requirements of Rule 56 (C) of the Rules of Civil Procedure. Although the City asserted that there was "no genuine issue as to any material fact", it did not present to the Court affidavits, depositions or documents pertaining to any except one of the many issues presented for determination. The sole issue with respect to which the City offered any evidence in support of its motion for summary judgment related to the absence of intention upon its part to appropriate any of the numerous properties involved in this action and affidavits to the effect that only some of the Liberty Mortgage properties, seventy-eight in number, were situated within the area of the active urban renewal project.

There is not even a single affidavit nor any evidence submitted by the City in support of its contention that there was no "physical invasion" of any such properties by the City or as a result of its conduct. Accordingly the judgment of the Court below was based solely upon affidavits submitted to describe the nature and extent of the urban renewal project and the specific location

of each of the numerous Liberty Mortgage properties involved and the absence of any intention to appropriate such properties.

The detailed allegations in the amended complaint with reference to deliberate, wrongful or improper conduct resulting in de facto taking of the Liberty Mortgage properties were disregarded in presenting the defendant's motion as though they did not exist.

The Court of Appeals observed in its opinion that "it is significant that although the District Court denied summary judgment as to the eighty-seven properties, it did not indicate what facts it believed were in dispute." The facts in dispute were those which were placed in issue by the amended complaint and the defendant's answer. They involved most of the allegations of some twenty odd paragraphs in which the plaintiff described the willful conduct of the defendant which resulted in a de facto taking of the bankrupt's properties.

The amended complaint alleges that:

> "The defendant forthwith widely publicized the fact that it intended to acquire promptly hundreds of residences throughout the Hough area and to cause to be removed therefrom the occupants and residents thereof. Forthwith also, upon the commencement of the execution of said project, the defendant caused to be made prominent and frequent public announcements and publication through all local media of public communication that the real properties above referred to were the subject of imminent governmental action * * * and that occupants and residents of said properties, unless voluntarily removing therefrom, would be forcibly removed by appropriate legal proceedings."

The amended complaint alleges further that the defendant:

> "Was fully aware of the fact that hundreds of persons occupying the Hough Project area were then residents and occupants of said area only because these same persons had removed from, or had been forcibly removed from, or had abandoned, residences previously occupied by them in other areas of the defendant, which said defendant had acquired, or had publicly announced its intention to acquire, or had specifically notified the residents and occupants referred to of its intention to acquire, by means of similar, or similarly intended, appropriate proceedings."

The amended complaint alleges many other acts and items of conduct of the City including deliberately failing to provide adequate police protection, adequate fire protection, adequate street maintenance, adequate garbage and rubbish collection, adequate sanitary conditions, and adequate building and housing code enforcement.

The amended complaint further alleges that the natural, probable, foreseeable and intended consequences of such conduct were the abandonment, vacation and complete vandalization of numerous properties of Liberty Mortgage.

These allegations were placed in issue by the defendant and both the conduct of the City, the intentions of the City with respect to the consequences thereof, and the natural and probable consequences of such conduct were all issues of fact when the United States Court of Appeals granted the defendant's motion for summary judgment.

REASONS FOR GRANTING THE WRIT

The nub of the decision of the United States Court of Appeals is to be found in the following quotations from its opinion:

> "Absent the abuse of eminent domain found in Foster (a prior decision by the same Court), including some action by the City indicating that the particular piece of property at issue is to be appropriated, economic loss caused by urban renewal does not constitute a taking within the meaning of the Fifth and Fourteenth Amendments."

* * * * *

> "We think the true rule is that there is no de facto taking of properties which have decreased in value because of an urban renewal project unless there is a physical invasion, damage or injury, or a restraint of some type, or action by the City to appropriate such properties."

In asserting it, no decision or opinion of this Court justifying or requiring such ruling was cited or relied upon. Instead the Court of Appeals added:

> "Essentially this was the holding of this Court in Woodland Market Realty vs. City of Cleveland, supra, and the well reasoned opinion of New York's highest court in City of Buffalo vs. J. W. Clement Company, supra, as well as many other cases."

This Court has never pronounced the rule which the Court of Appeals asserts to be the law, and announces as the rule which bars all recovery in this case.

It is, at the least, quixotic for the Court of Appeals to refer to the plaintiff's amended complaint as alleging

only a "decrease in value" or "an economic loss" when the amended complaint alleges specifically the complete destruction or the complete vandalization and the utter uselessness of numerous of the properties of Liberty Mortgage caused by the intended, deliberate and wrongful acts of the City, and not merely "economic loss caused by urban renewal" or "properties which have decreased in value because of an urban renewal project."

The petition for certiorari should be granted because the rule announced by the Court of Appeals, if followed by that Court, or elsewhere, will materially affect dozens of cities and thousands of property owners. It could accord to such cities a carte blanche privilege to engage in deliberate conduct resulting in the de facto destruction and taking of innumerable properties for public use with no liability on the part of such cities for the payment of just compensation required under the Fifth Amendment to the United States Constitution.

The Court of Appeals itself recognized the probable widespread effect of its decision, observing that "this Court is no stranger to the troublesome legal issues that arise when cities undertake ambitious programs of urban renewal."

The widespread importance of these problems and the unfortunate consequence of the decision of the Court of Appeals call for a full review of the charges against the City of Cleveland, and the pronouncement by this Court of the proper and appropriate rule of law governing the determination of such charges, and implementing the guarantee of the Fifth Amendment, when "taking" by a City has in fact occurred.

The petition for certiorari should also be granted because the Court of Appeals has placed upon the right

to be accorded just compensation for a de facto taking of private property for public use conditions which may not properly be imposed upon the award of such compensation. To preclude an owner of property from securing just compensation for the de facto taking of his property because there was no declared intention to do so, and no physical invasion of the property, can only result in abrogating the guaranteed constitutional right to just compensation in innumerable instances and under a great variety of circumstances.

The petition for a writ of certiorari should be granted because this Court has as yet considered the problem of "de facto taking" only on a case by case basis and has pronounced no general rule or statement of principle as a guideline for the courts and the people generally. The absence of such a guideline pronouncement by this Court has engendered a fateful consequence for the plaintiff in this case, and will assuredly similarly affect hundreds of other plaintiffs in like circumstances.

The Court of Appeals interpreted the decisions of this Court as awarding compensation only "in the context of either a physical invasion or physical restraint on the land." Whereas, e.g., in *United States v. Cress*, 243 U.S. 316, 37 Sup. Ct. 380, this Court found:

> "The right to have the water flow away from the mill dam unobstructed, except as in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land. *A destruction of this right is a taking of a part of the land.*"

The petition for a writ of certiorari should be granted because the Court of Appeals has erroneously and improp-

erly limited and restricted the consequences of the case by case awards of compensation by this Court under the Fifth Amendment for the de facto taking of property (e.g. *United States v. Cress, supra, United States v. Causby,* 328 U.S. 256, 66 Sup. Ct. 1062; *Griggs v. County of Allegheny, Pa.,* 369 U.S. 84, 82 Sup. Ct. 531).

The petition for a writ of certiorari should be granted because the judgment of the Court of Appeals effectively extinguishes the significance of that group of rights which together provide meaning to the ownership of property. This real meaning of the ownership of property is referred to by the Supreme Court of Ohio in *Smith v. Erie Railroad Company,* 134 Ohio St. 135, 16 N.E.2d 310, wherein that Court declared:

> "The broader view, which now obtains generally, conceives property to be the interest of the owner in the thing owned, and the ownership to afford the owner the rights of use, exclusion and disposition. Under this broad construction, there need not be a physical taking of the property or even dispossession; any substantial interference with the elemental rights growing out of ownership of private property is considered a taking."

Moreover, in *Smith,* the Ohio Supreme Court directly contradicts the conception and view adopted by the Court of Appeals in the case at bar, stating succinctly:

> "There are many cases in this jurisdiction which bear upon the legal problem under discussion, but none to our knowledge which denies compensation for a taking because the invasion of property was not physical but merely resulted in the impairment of a right appendant or appurtenant to the corpus."

The petition for a writ of certiorari should be granted to enable this Court to adopt and to state as guidelines for the entire country the principles set forth in the above quoted declarations by the Supreme Court of Ohio.

CONCLUSION

For the reasons set forth, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWIN F. WOODLE
628 Keith Building
Cleveland, Ohio 44115
241-7313
Attorney for Petitioner

APPENDIX

OPINION AND ORDER OF DISTRICT JUDGE WILLIAM K. THOMAS

(Filed November 17, 1967)

Civil Action C66-788

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MAURICE M. SAYRE,
Trustee in Bankruptcy of the Liberty
Mortgage Corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA

and

THE CITY OF CLEVELAND,
Defendants.

MEMORANDUM

THOMAS, J.

Maurice M. Sayre, trustee in bankruptcy of the Liberty Mortgage Corporation, sues the United States of America and the City of Cleveland for $10,000,000 in damages for loss of income, earnings and property of the plaintiff's bankrupt. As a cause of the losses it is claimed that the defendants acted negligently in the conduct of the University-Euclid Urban Renewal Area Project (which

plaintiff sometimes designates as the Hough area project); and it is claimed also that acts and omissions of the defendants in carrying out this urban renewal project constituted a taking of the bankrupt's properties without just compensation in violation of the fourteenth and fifth amendments of the United States Constitution.

Defendant City of Cleveland moves to dismiss the plaintiff's complaint filed November 11, 1966, and his supplement to the complaint filed March 24, 1967. Defendant United States of America moves for summary judgment. Defendant City's motion to dismiss will be first considered.

Defendant City of Cleveland urges that the complaint fails to state a claim against the defendant City of Cleveland within the jurisdiction of this court. It is further urged that the complaint does not allege facts sufficient to constitute a claim upon which relief may be granted against defendant City of Cleveland.

The original complaint includes these statements and claims. Plaintiff's bankrupt, Liberty Mortgage Corporation, an Ohio corporation, owned, managed, and operated residential properties in Cleveland in 1961 and prior years. A substantial number of the properties owned by the bankrupt were in the Hough project area.

In accordance with the Housing Act of 1949 the United States Government made available many millions of dollars for the purpose of aiding municipalities in the intended physical improvement of large areas of such municipalities. A federal urban renewal administration was established to administer and supervise the distribution and use of the federal funds.

The City Planning Commission of Cleveland on January 27, 1961 adopted the University-Euclid General

Neighborhood Renewal Plan. On June 14, 1961 the Cleveland City Council enacted ordinance No. 1338-61, declaring the area incorporated in said project to be a slum, blighted, deteriorated, and deteriorating area of the City of Cleveland; and the ordinance stated that it "was necessary for the health and welfare of the residents of the defendant City. The University-Euclid Urban Renewal Plan, designated as Project No. 1 Ohio R-44 comprises approximately 488 acres of land east of East 105th Street on the east side of Cleveland and about the same number of acres lying to the west of East 105th Street.

It is stated that the University-Euclid plan, adopted by the City of Cleveland and approved and supervised by the United States, contemplated the acquisition by the City of Cleveland of a large number of residences, including many of the properties of the Liberty Mortgage Corporation. Said properties were intended to be acquired by negotiation and voluntary sale if possible, and if not possible then by proceedings instituted in the courts for appropriation of such properties by virtue of the exercise by the City of Cleveland of its power of eminent domain.

Plaintiff alleges that the defendants knew and were fully aware:

> that if, by their conduct, they should cause properties to be, and to become and to remain, vacant and unoccupied, that in all probability such unoccupied properties would be promptly and thoroughly vandalized and destroyed.

It is alleged:

> By reason of the careless and negligent manner in which said Hough area project was carried out, a large number of properties owned by this plaintiff's

> bankrupt, and previously occupied and previously producing substantial income, were caused to be vacated and abandoned, and were caused to remain vacated and abandoned, and were caused to be vandalized and destroyed.

It is stated that on July 14, 1961 the defendant City commenced the execution of the Hough project. In furtherance thereof:

> said defendant forthwith sent, or caused to be sent, to hundreds of residents and occupants of the project area, including scores of residents and occupants of properties owned by the plaintiff's bankrupt herein, notices to the effect that the defendant City intended to acquire said properties.

It is said that:

> said notices were sent out carelessly, hastily and without regard for the rights of the owners of said properties, including plaintiff's bankrupt, and without any regard whatsoever for the actual time at which the defendant City proposed or intended, or in fact took, any action whatsoever for the purpose of, acquiring or even negotiating to acquire the properties occupied by such persons. The sending of such notices under such circumstances constituted a grossly careless and negligent act.

The complaint continues that:

> compounding the effect of the careless and negligent conduct of the defendant City set forth . . . said defendant promptly caused to be made prominent and frequent public announcements and publication through all local media of public communication of its intention to appropriate the properties above re-

ferred to within the Hough project area, and of its intention to cause the occupants thereof to be removed therefrom, stating to the public generally that such properties were the subject of imminent governmental action in the form of appropriation and rehabilitation by the defendants.

It is further said that:

the defendants proceeded in a careless, inadequate and incompetent manner to acquire in hit and miss fashion small numbers of properties to whose occupants such notices had been sent.

Following up this point it is contended that:

The conduct of the defendants . . . had a fatal and devastating effect upon the business of plaintiff's bankrupt. Although said bankrupt, at the time of the adoption of the Hough area project and up until the date of bankruptcy, was the owner of scores of properties within the project area, dozens of which the defendant City indicated its intention to appropriate, nevertheless at the time the Liberty Mortgage Company was declared bankrupt on the 2nd day of November, 1964 . . . the defendant City had taken steps to acquire not more than twelve of said properties and had completed acquisition of not more than one or two of them.

Another claim relates to the defendant City's alleged refusals to permit repairs. It is recited that:

plaintiff's bankrupt made numerous attempts from time of the adoption and approval of the Hough area plan until the determination of bankruptcy to maintain, to repair and to improve the properties owned by plaintiff's bankrupt in the Hough project area

> which had not been so thoroughly vandalized as a result of the defendant's described conduct as to be impossible of maintenance.

However, it is claimed that:

> in many instances, the defendant City refused applications made by said bankrupt to repair and to improve said properties . . . [and that] . . . the defendant, by such refusal, caused these properties to be further, and in a number of instances entirely, deteriorated.

The complaint charges both defendants with lack of cooperation in the execution of the Hough area project, with failure to maintain streets, sidewalks, disposal of garbage and rubbish, removal of accumulated and deposited litter and debris, adequate and sufficient health, safety, and sanitation of the residents of the project area. It is said that the defendants caused and permitted said project area to remain without adequate and sufficient police protection; and that this negligent conduct directly and proximately caused and contributed to cause vandalism of plaintiff's bankrupt's property within the project area.

Finally, the complaint states that by reason of the defendants' conduct the plaintiff's bankrupt was prevented from and unable to maintain in repair and in good condition its properties within the Hough project area and was deprived of thousands of dollars of income from the properties within the project area, was caused to lose by vandalism, destruction, and decay, a large number of properties in said area, and, resulting directly and proximately from defendants' conduct, was forced into bankruptcy. It is claimed that plaintiff's bankrupt was deprived of all of its assets, of maintaining its income and in fact entirely prevented from earning any income whatsoever, that if said event had not been caused to occur, said bank-

rupt would have continued to earn hundreds of thousands of dollars annually thereafter as it had earned prior to said bankruptcy, and plaintiff's bankrupt has been damaged in the amount of $10,000,000.

The nature and effect of the supplement to complaint will be considered later.

Plaintiff's original complaint, its fifteen pages here extracted and condensed, undertakes to frame a claim in negligence against the defendant City of Cleveland. It is charged that the sufficiency of the complaint fails. Defendant City urges that the establishment and execution of an urban renewal program even if negligently carried on is a governmental function not actionable under Ohio's rule of sovereign immunity.

Plaintiff, on the contrary, emphasizes that there was no obligation on the part of the City of Cleveland to undertake the University-Euclid Urban Renewal Project. With the City voluntarily electing to undertake this project, plaintiff argues that the City's conduct of the project is "private and proprietary." Plaintiff insists that the applicable test is declared in *Wooster v. Arbenz*, 116 Ohio St. 281, at 284, 156 N. E. 210, at 211-12 (1927) when it states:

> If . . . there is no obligation on the part of the municipality to perform them, but it does in fact do so for the comfort and convenience of its citizens, for which the city is directly compensated by levying assessments upon property, or where it is indirectly benefited by growth and prosperity of the city and its inhabitants, and the city has an election whether to do or omit to do those acts, the function is private and proprietary.

In *Corbean v. Xenia City Board of Education*, 366 F.2d 480 (6th Cir. 1966), the United States Court of Ap-

peals for the Sixth Circuit, recognizes Ohio's adherence to the doctrine of sovereign immunity. The doctrine persists, see *Gabaris v. Blake*, 9 Ohio St. 2d 71, 223 N.E. 2d 597 (1967). Chief Justice Marshall's test of the "private and proprietary" function, quoted from *Arbenz, supra,* however seems to be honored more in the breach than in the observance. In the recent case of *Hyde v. Lakewood,* 2 Ohio St. 2d 155, 207 N.E. 2d 547 (1965) the operation of Lakewood City Hospital, though entirely voluntary on the part of the City of Lakewood, was found under the facts of that case to be a governmental function.

Just because Cleveland voluntarily elected to contract with the Federal Government to undertake an urban renewal project cannot serve to make that project a "private and proprietary function." If that were so every federal aid program voluntarily undertaken by state, county, or municipal governments—interstate highway systems, county welfare programs, local anti-poverty programs, to cite some better known examples—by the alchemy of the *Arbenz* test ("and the city has an election whether to do or omit to do those acts") would be transformed from a government to a proprietary function. The *Arbenz* test of whether a municipal function is governmental or proprietary is undependable and outdated. It is here found to be inapplicable.

Ohio recognizes slum and blight clearance and prevention as a public purpose. *State, ex rel Bruestle v. Rich,* 159 Ohio St. 13, 110 N.E. 2d 778, Syl. 1 (1952), holds that where an urban redevelopment project has as its primary purpose the elimination of slum conditions and prevention against their recurrence, "such project may involve a public use or purpose for which public funds can be expended and the power of eminent domain exercised."

In view of the purposes of the University-Euclid Urban Renewal Plan, deemed by Cleveland City Council to be "necessary for the health and welfare of the residents of Cleveland," and in view of *Bruestle's, supra,* apt holding that an urban renewal project involves a public purpose, the University-Euclid Urban Renewal Area Project is found and determined to be a governmental function. In reaching this conclusion this court follows the Ohio rule, as expressed in *Hyde, supra,* that "whether the performance of various activities by a municipality is governmental or proprietary frequently depends on the peculiar facts of the particular case."

As a governmental function, the establishment and execution of University-Euclid Urban Renewal Project cannot give rise to an action in negligence. Hence, as a claim of negligence based on the careless operation of the project, plaintiff's complaint does not and cannot state a cause of action against defendant City of Cleveland.

Yet even if it were assumed that plaintiff's complaint does state a cause of action in negligence against defendant City of Cleveland, no federal jurisdiction exists to hear and to determine such a claim. Both the plaintiff's bankrupt, Liberty Mortgage Corporation, and the City of Cleveland are Ohio corporations. Hence there is no diversity of citizenship between these parties to give this court jurisdiction under Title 28, U. S. C. § 1332 (1964).

The joinder of the defendant United States of America as a co-defendant, charged as a tort feasor under the Federal Tort Claims Act, 28 U. S. C. § 1346 (d) (1964) cannot collaterally bestow federal jurisdiction on a negligence claim against the defendant City of Cleveland. It is nevertheless essential that there be diversity of citizenship or other basis for federal jurisdiction of plaintiff or his bankrupt's suit against the defendant City of Cleveland

in federal court. See *Benbow v. Wolf*, 217 F. 2d 203 (9th Cir. 1954); *Bullock v. United States*, 72 F.Supp. 445 (D. N.J. 1947); *Sykes v. United States*, 290 F. 2d 555 (9th Cir. 1961); and 3 *Moore, Federal Practice*, § 20.07 (2d ed. 1966).

Nor does the plaintiff's status as a trustee in bankruptcy supply the missing federal jurisdiction. Only if his bankrupt could have brought suit in a federal district court on a negligence cause of action against the city would the bankrupt's trustee be permitted to sue in a federal distrial curt. See Title 28 U. S. C. § 46(b) (1964) as interpreted in *Whitman v. Chicago & N. W. Ry.*, 70 F.Supp. 9 (D. Minn. 1947).

Were defendant City's motion to dismiss directed only to the negligence claims of the original complaint, the foregoing conclusions would require the dismissal of the complaint. The motion of defendant City of Cleveland, however, must be judged on the original complaint as amended by the supplement to the complaint. Not a supplemental pleading as defined by Rule 15(d) *Fed. R. Civ. P.*, the supplement will be treated as an amendment to the complaint. The supplement to complaint first amends paragraph 1 of the complaint by stating:

> In addition, jurisdiction of this Court in the within action is also conferred by the provisions of the Fifth Amendment and the provisions of the Fourteenth Amendment to the Constitution of the United States.

The supplement then adds numbered paragraphs 32, 33, and 34. Paragraph 32 recites:

> 32. At all times referred to in this Complaint, the laws of the State of Ohio contain numerous provisions for procedure to be followed by the defendant The City of Cleveland for the appropriation by said defendant of real property under the urban renewal plan

referred to in this Complaint. Among said steps were the announcement of the proposed plan to be public, the adoption of the plan by the Council of the defendant City, after a public hearing; and thereafter the furnishing by the defendant City of notices directed to the owners and occupants of specific real property indicating the intention of the defendant City to acquire such real property either by negotiation or by means of appropriate legal action.

As heretofore set forth, the defendant City undertook to notify the plaintiff's bankrupt of its intention to appropriate numerous parcels of real property within the Hough urban renewal area, pursuant to the plan adopted by said defendant. At the same time, said defendant undertook to notify the occupants of said premises owned by the plaintiff's bankrupt. This action on the part of the defendant City, carried out in the manner hereinbefore described, constituted the initial steps in the appropriation of the property of plaintiff's bankrupt, which appropriation the defendant City never carried to completion and which said defendant at no time had the facilities or the ability to consummate.

Paragraph 1 of the complaint as amended states that jurisdiction in the within action is "conferred by the provisions of the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States." Paragraph 33, added by the supplement to complaint, states in part that the:

> conduct of the defendant City heretofore described in this complaint, and described in particular in paragraph 32, constituted a pro tanto taking and appropriation of the property of plaintiff's bankrupt, with

> all of the consequences heretofore described, for which taking no compensation whatsoever has been or will be offered.

In passing on the question of whether there is federal jurisdiction to hear the amended complaint, a point of beginning is *Chicago, B.&Q. R.R. v. Chicago*, 166 U. S. 226, at 241 (1897). There the Supreme Court held that a state eminent domain proceeding:

> whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States . . . .

Malloy v. Hogan, 378 U. S. 1, at 4 (1964) construed *Chicago, B. & Q. v. Chicago, supra*, to hold that:

> the Due Process Clause requires the States to pay just compensation for private property taken for public use.

Thus, the Supreme Court determines that the due process clause of the fourteenth amendment is the equivalent of the fifth amendment provision "nor shall private property be taken for public use, without just compensation."

Bearing directly on the present question of federal jurisdiction, *Foster v. Herley*, 330 F. 2d 87 (6th Cir. 1964) involved the question of whether federal jurisdiction exists to hear and determine an amended complaint. There the amended complaint alleged that:

> [T]he City, in causing and permitting the threat of condemnation to hang over the plaintiff's property, and the foregoing actions of the City over a period

> of ten years, was an abuse of the power of eminent domain, deprived the plaintiff of the full use and benefit and the right to ownership of the property, amounted to a taking or damaging of his property without due process of law and in violation of his right under the Fourteenth Amendment to the Constitution of the United States. *Foster v. Herley, supra* at 89.

Reversing a dismissal of the complaint and ordering the case to be tried on the merits, the Court of Appeals for the Sixth Circuit held:

> The plaintiff claims a right under the Fourteenth Amendment to the United States Constitution not to be deprived of his property without due process of law and that the acts of the defendant constituted such a deprivation. If the Fourteenth Amendment is so construed, it supports his claim. If it is not so construed, his claim is defeated. The District Court has jurisdiction under Section 1331, Title 28 United States Code, to decide this question. [citations] *Foster v. Herley, supra* at 91.

Under *Foster v. Herley, supra,* it is the law of this circuit that a municipality's claimed abuse in its exercise of the power of eminent domain, with the claimed result of taking private property without just compensation, presents a question of federal jurisdiction under the fourteenth amendment which a federal district court must hear and determine. Plaintiff's amended complaint in charging the defendant City with conduct which tends to state an abuse in the exercise of the power of eminent domain presents a federal jurisdictional question under the fourteenth amendment as interpreted in *Foster v. Herley, supra.*

It remains to determine whether the amended complaint, which seeks to charge abuse in the exercise of the power of eminent domain, states a cause of action against defendant City of Cleveland. Plaintiff's counsel observes that "the amendment to the complaint in this cause was specifically framed to bring this action within the purview of those two controlling decisions" (*Foster* cases). The decision on remand of *Foster v. Herley, supra*, to the United States District Court for the Eastern District of Michigan, Southern Division, therefore should now be viewed. It was tried under the caption *Thomas E. Foster and Georgia Lee Foster, plaintiffs v. City of Detroit, defendant*, reported at 254 F. Supp. 655 (E.D. Mich. 1966) appeal docketed, Nos. 17840, 17843, 6th Cir., July, 1966. District Judge Kaess' findings and conclusions are summarized in the fourth headnote:

> 4. Eminent Domain. A taking of property occurred and payment of just compensation was required, where City of Detroit selected older area for slum clearance and public housing, commenced condemnation proceedings in 1950, substantially contributed to an aggravated deterioration and decline in property values in area by discouraging improvements by actually completing condemnation and clearance of several blocks in area, by requiring razing of many vandalized buildings and by keeping lis pendens in effect for five years after stop order on project, and abandoned condemnation proceedings in 1960 and thereafter commenced new proceedings.

The district court's decision relies on *Detroit v. Cassese*, 376 Mich. 311, 136 N. W. 2d 896 (Mich. Sup. Ct. 1965) and *City of Cleveland v. Carcione*, 118 Ohio App. 525, 190 N.E. 2d 52 (1963). Judge Kaess describes *Cassese* as "a case arising out of the same factual situation." The

Michigan Supreme Court in *Cassese, supra,* at 900, reaches conclusions which have present pertinence. Referring to previously cited cases the *Cassese* opinion declares:

> The principle is firmly established in Michigan law by *Pearsall, Ranson, Grand Trunk and Long, supra,* that a city may not by deliberate acts reduce the value of private property and thereby deprive the owner of just compensation. Some of the acts charged against the City of Detroit, such as lax police protection, reduction in refuse collections, street cleaning and street repair, go merely to the performance of city services of a general nature. The issue of satisfactory performance of such services would not be relevant in the absence of proof of calculated action or specific directives by city officials for the purpose of reducing the value of appellant's properties. On the other hand, many of the acts alleged by the appellant, if so performed,—such as sending letters to tenants, filing lis pendens, intense building department inspection and citations against owners for any violations of the building code, and, finally, refusal to permit a long established business to continue in a building because it was going to be condemned—would fall within the same category as the acts in *Pearsall, Ranson, Grand Trunk and Long, supra,* and would constitute a taking.

Cassese recognizes that "a city may not by deliberate acts reduce the value of private property and thereby deprive the owner of just compensation." Detroit's completion of the eminent domain proceedings, deliberately done, indisputably constituted an intentional taking of the owner's property. The question on review concerned the timing of the taking. In accordance with the trial court's instructions the jury fixed the value of the take at the

time of trial. The Michigan Supreme Court reversed. It determined that assessment of just compensation should reflect the value of the property at an earlier date before the value was allegedly depreciated by the City of Detroit sending "letters to tenants, occupants, [etc.] causing them to move; creating vacancies . . .," and performing the listed acts. These various acts of the city "would constitute a taking," it was held.

In the *Foster, supra,* trial in the United States District Court it was apparently accepted that the state court proceedings appropriating the subject property were final. The *Foster* decision, *supra,* like *Cassese, supra,* found that the property was taken by the City of Detroit at an earlier date by reason of the City's prior acts. In *Foster, supra,* Judge Kaess, to insure just compensation, fixed the value of the take at the earlier date and awarded the difference between that value and the amount already granted in the state appropriation case.

The complaint's claims that in the Hough area the City of Cleveland provided inadequate police protection, inadequate and insufficient garbage and rubbish removal, inadequate street and sidewalk maintenance would not constitute claims of taking of the properties of plaintiff's bankrupt, under the authority of *Cassese, supra,* in the absence of additional claims that the city officials took "calculated action" to reduce the value of the properties.

Other acts of the City of Detroit found in *Cassese, supra,* and *Foster, supra,* to constitute a taking of property, are similarly claimed by the plaintiff to have been performed by the defendant City of Cleveland. Thus in the original complaint plaintiff alleges that the City "sent notices to residents and occupants of properties owned by plaintiff's bankrupt," and that the defendant City "caused

to be made prominent and frequent public announcements . . . of its intention to appropriate the properties . . . and of its intention to cause the occupants thereof to be removed therefrom." Plaintiff also claims that "in many instances, the defendant City refused applications made by said bankrupt to repair and to improve said properties."

In Paragraph 32 of the amended complaint (original complaint amended by the supplement) the plaintiff reiterates the acts of defendant City (particularly the notices indicating the intention of defendant City to acquire such real property). It is said that "this action on the part of the defendant City . . . constituted the initial steps in the appropriation of the property of plaintiff's bankrupt, which appropriation the defendant never carried to completion and which said defendant at no time had the facilities or the ability to consummate." The first paragraph of numbered Paragraph 33 alleges that:

> The conduct of the defendant City heretofore described in this Complaint, and described in particular in paragraph 32, constituted a pro tanto taking and appropriation of the property of plaintiff's bankrupt, with all the consequences heretofore described, for which taking no compensation whatsoever has been or will be offered.

The amended complaint states that Cleveland initiated steps to appropriate properties of plaintiff's bankrupt. These steps are identical to some of Detroit's acts which *Cassese, supra,* and *Foster, supra,* found constituted a taking of property under similar circumstances. In the present case, as in those cases, the doing of these acts by the municipality purportedly caused tenants and occupants to leave properties, caused properties to become vacant and non-income producing, and finally resulted in destruc-

tion of the properties by vandals. No physical invasion of the properties by the defendant City is claimed. Yet without being absolutely taken, a taking of property may occur "if the action by the government involves a direct interference with or disturbance of property rights." See *R. J. Widen v. United States,* 357 F. 2d 988 (Ct. Cl. 1966).

Nevertheless, a government's intention to take property is deemed essential to constitute a taking of private property. In construing and applying the requirement of the fifth amendment that private property shall not be taken for public use without just compensation (equally applicable to the due process clause of the fourteenth amendment) the Court of Claims holds, as reaffirmed in *Biggs Rental Co. v. United States,* 353 F. 2d 1013, at 1017 (1965):

> To constitute a taking there must be an intent on the part of the United States to take plaintiff's properties, or, at least an intention to do an act the natural consequences of which was to take property.

In the present case eminent domain proceedings involving the properties of plaintiff's bankrupt, though apparently commenced in accordance with law, have never been accomplished. Hence, Cleveland's intention to take one or more of the subject properties cannot be established, as in *Cassese, supra,* and *Foster, supra,* by the fact of completion of the appropriation proceedings. Yet, as seen, *Biggs Rental Company, supra,* holds that an intentional taking of property occurs if the government intentionally does an act "the natural consequence of which was to take property." Applying *Biggs, supra,* Cleveland's intent to take the properties of plaintiff's bankrupt is sufficiently charged when plaintiff's amended complaint states in Paragraphs 16 and 18:

> [16] At the time of the adoption and approval of the Hough area project, both defendants knew and were fully aware of the fact that as soon as the nature and extent of the Hough area plan would be made known to the residents of the area, and in particular to the residents and occupants of property to be acquired by the defendant, the City of Cleveland, said residents and occupants, in large numbers, would immediately remove from and abandon the properties occupied by them.
>
> [18] Said defendants further knew and were fully aware of the fact that if, by their conduct, they should cause properties to be, and to become and to remain, vacant and unoccupied, that in all probability such unoccupied properties would be promptly and thoroughly vandalized and destroyed. . . .

The element of causation is also essential to a claim of abuse of the eminent domain proceedings constituting a taking of property without just compensation. Thus, in *Foster, supra,* at 662, Judge Kaess found with reference to the conduct of the eminent domain proceedings by the defendant City of Detroit, "that the protracted delay and the actions of the defendant, if they were not the only causes, substantially contributed to, hastened and aggravated the deterioration and decline in value of the area in general and of plaintiff's property in particular."

An abuse of the exercise of the power of eminent domain would constitute a taking of property without just compensation if that abuse directly and proximately contributes to, hastens, and aggravates, acting alone or in combination with other causes, the deterioration and decline in value of the area and the subject property. On the other hand, an abuse in the exercise of the power of eminent domain would not constitute a taking of prop-

erty without just compensation if substantially the same depreciation in the value of the area and of the subject property would have occurred irrespective of initiation of or delay in the appropriation proceedings. Or, put another way, if the neighborhood decay which justified the inception of the urban renewal project, or progression of that same decay would have caused substantially the same decline in value of the area and of the subject property, in the absence of any appropriation proceedings, a taking of the property without just compensation did not occur.

Plaintiff's original complaint attributes the vacating, abandonment, vandalizing, and destruction of properties owned by the plaintiff's bankrupt to "the careless and negligent manner in which said Hough area project was carried out." The supplement to complaint, on the other hand, broadly says "the conduct of the defendant City . . . constituted a pro tanto taking and appropriation of the property of plaintiff's bankrupt," and later it says "plaintiff is entitled to a determination of the damages caused to plaintiff's bankrupt and the loss of property caused to plaintiff's bankrupt by said conduct." Considering the contentions of causation in the light most favorable to the plaintiff the element of causation is sufficiently pleaded.

The intertwined claims of negligence, already held legally insufficient as against the City, are therefore treated as superfluous and ineffective.

Plaintiff alleges in Paragraph 33 of his amended complaint as follows:

> The laws of the State of Ohio provide no procedure by virtue of which plaintiff's bankrupt could or can secure from the defendant City compensation for the

taking of its property in the manner herein described. Moreover, the Supreme Court of the State of Ohio has so interpreted and applied within that state the guarantee set forth in the Fifth Amendment to the Constitution of the United States forbidding the taking of private property for public use without payment of just compensation therefor, which guarantee affords protection to the plaintiff's bankrupt by virtue of the provisions of the Fourteenth Amendment to the Constitution of the United States, in such manner as to deny to plaintiff's bankrupt and to all owners of property similarly situated the receipt of just compensation for such taking and the equal protection of the loss to which plaintiff's bankrupt is entitled.

Whether or not plaintiff can establish these claims as a matter of law need not now be decided. Should the plaintiff eventually establish his claim on the merits it might then become necessary to decide whether the plaintiff is without remedy, as he claims, in the state courts under Ohio's laws and controlling decisions. At such a time *City of Cleveland v. Carcione, supra,* would be considered. Depending upon that conclusion this court could then determine whether it should grant or abstain from granting the relief sought.

The defendant United States of America moves this court to enter summary judgment for defendant United States "on the ground that the pleadings previously filed in this matter, the affidavit filed as part of this motion for summary judgment, and the memorandum in support of the United States' motion for summary judgment show that the defendant is entitled to judgment as a matter of law."

Plaintiff, as has been seen, jointly sues the United States of America and the City of Cleveland for

$10,000,000. The claim against the United States rests upon the Federal Tort Claims Act, 28 U. S. C. § 1346 (b) (1964). *Rayonier, Inc. v. United States,* 352 U. S. 315 (1957) declares "the purpose of the Federal Tort Claims Act was to waive the government's traditional all-encompassing immunity from tort action and to establish novel and unprecedented governmental liability." The breadth of the Act's purpose is plainly described by *Indian Towing Co. v. United States,* 350 U. S. 61, 68-69 (1955):

> The broad and just purpose which the statute was designed to effect was to compensate victims of negligence in conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws.

It is fundamental tort law that negligence is an act or omission in violation of a duty to exercise ordinary care by reason of which injury to person or property occurs. A claim actionable under the Federal Tort Claims Act can be stated within the context of the University-Euclid Urban Renewal Area. At the recent ground breaking ceremonies for new housing at 9300 Hough Avenue, if the Secretary of Health, Education and Welfare had let his shovel fly out of his hands causing injury to a nearby property, the owner could hold the United States liable for the proximate damage. By virtue of the Federal Tort Claims Act the government's sovereign immunity is removed under circumstances in which a private person would owe a duty of ordinary care. The Government thereby becomes responsible for the negligent act of its employee—even a cabinet member.

As each claim of negligence of the United States alleged by the plaintiff is studied it must be asked if it

charges violation of any duty imposed on the government to avoid injury or harm to the class of persons—property owners in the University-Euclid Urban Renewal Area—to which class plaintiff's bankrupt belonged.

The several claims of negligence which the plaintiff makes against the United States will not be lumped together in a group. Instead, the claims made individually against the defendant United States and the joint claims against both defendants, some of which appear in the previous summary of plaintiff's complaint, will be considered in the course of the ensuing discussion.

The University-Euclid Urban Renewal Area Project is a product of the Federal Housing Act of 1949, 42 U. S. C. § 1441 (1964), particularly Subch. 2, §§ 1450 through 1465. An urban renewal fund is created by the act and made available for advances, loans, and grants to local public agencies for urban renewal projects. The role of the federal government is to "provide the necessary financial assistance that will enable local communities to make an effective start to eradicate the slums." H.R. Rep. No. 590, 81st Cong. 1st. Sess. 14 (1949). But as stated in S. Rep. No. 84, 81st Cong. 1st Sess. (1949), "The slum clearance project assisted under the bill would be locally planned and locally executed."

The general scheme and aim of the urban renewal provisions of the Housing Act of 1949 are clear and laudable. Congress recognizes that federal financing is essential to aid cities willing to provide local initiative and funds to undertake projects to check urban blight and to renew slum areas. To accomplish these purposes while protecting the expenditure of federal monies the Act orders "the Housing and Home Finance Administrator, before entering an urban renewal contract for loan or capital grant to require the locality to present a workable program for

community improvement . . . for utilizing appropriate private and public resources to eliminate, and prevent the development or spread of, slums and urban blight. . . ."

The Act permits the administrator to make a "temporary loan or loans to any . . . local public agency to finance the acquisition of . . . real property." The Act also permits the administrator to make capital grants to local public agencies which generally shall not exceed two-thirds of the total cost of the project. Local grants in aid, on the other hand, are generally required to equal at least one-third of the total cost of the project. The loans furnish the immediate monies to allow the local public agency to proceed with land acquisition and other expenses. The capital grants apparently are paid when the project is completed (though advances may be made by the administrator) and are used by the local public agency together with its local grants-in-aid to pay off the federal loans.

Contracts for loans or capital grants shall be made only with a duly authorized local public agency and the contract requirements are enumerated. The urban renewal plan for the urban renewal area must be approved by the governing body of the locality in which the project is situated and the approval must include findings among which are the need of the financial aid, that the urban renewal plan will afford maximum opportunity for the rehabilitation or redevelopment of the urban renewal area by private enterprise, and that the plan conforms to a general plan for the development of the locality as a whole. The contract must require that there be a feasible method for the temporary relocation of individuals and families displaced from the urban renewal area.

The administrator is empowered to appoint a director to administer the provisions of the subchapter on urban

renewal. Among the administrator's powers and duties he may sue and be sued, foreclose on any property or commence any action to protect or enforce any right conferred upon him by any law, contract, or agreement.

Based on the urban renewal law, here outlined, the sufficiency of the plaintiff's principal claims of negligence will be examined. Plaintiff claims that the defendant United States provided careless and inadequate supervision and inspection of the University-Euclid Urban Renewal Area Project and thereby permitted blight and decay to spread throughout the Hough project area. Expanding the claim of inadequate supervision, Paragraph 27 of the complaint states:

> Instead of providing for the Hough area project adequate supervision, instead of fulfilling its responsibility to the property owners of the project area to see to it that funds advanced by it were in fact used so as to bring about the renewal and the rehabilitation of the project area in the manner and at the times provided by the renewal plan, the defendant, the United States, carelessly and negligently failed to undertake and to carry out its duties and responsibilities in these respects. Instead, the time and effort which said defendant should have devoted to carrying out such duties and responsibilities was devoted by the United States to the constant preparation and circulation of regulations, orders, directives, amendments to regulations, amendments to orders, amendments to directives, modifications and changes of regulations, modifications and changes of orders, modifications and changes of directives, explanations of regulations, explanations of orders, explanations of directives, and the transmittal to its agencies almost daily, at least several times weekly, of the foregoing. In so doing,

> said defendant regularly and constantly made it more difficult for both of said defendants to execute the Hough area plan in an orderly, careful and proper manner, and placed in the way of such performance almost insurmountable barriers of red tape, all of which directly caused and contributed to cause the damage to the plaintiff described in this complaint.

In carrying out the purposes of the urban renewal law and to protect the expenditure of federal funds, the Administrator has a responsibility to all Americans, including the property owners of the University-Euclid Urban Renewal Project Area, "to see to it that funds advanced by it [United States] were in fact used so as to bring about the renewal and the rehabilitation of the project area in the manner and at the times provided by the renewal plan." But the Administrator owes no unique responsibility to the property owners of the Hough area not owed to all citizens and taxpayers.

The Administrator has the power and the responsibility to make inspections and audits of a project and he may provide "representatives at the site." The necessary expenses of such services, in the form of "fixed fees" are to be paid by the local public agency. But the urban renewal law does not prescribe any specific duty of supervision or inspection by the Administrator, the claimed failure of which inspection can confer a legal right of action upon the owners of property within the urban renewal area.

Plaintiff claims that the execution of the University-Euclid Urban Renewal Project has been impeded by the defendant United States placing "in the way of such performance almost insurmountable barriers of red tape." Plaintiff's counsel in his brief states:

> the evidence in this case . . . will involve specific case after specific case in which the plaintiff's bankrupt appealed to and attempted to do business with agencies and employees of the defendant, the United States, and in which such agencies and employees so negligently and improperly handled such applications as to contribute directly to occasioning the damages described.

The property owners in the University-Euclid project area may be justifiably exasperated with bureaucratic red tape which may have slowed the completion of the project. Yet the material point of law remains that the Housing Act of 1949 contains no provision which would make the United States liable in tort because of excessive red tape or because applications of plaintiff's bankrupt to the Housing and Home Finance Administrator or his agency were improperly handled, even assuming that these claims of plaintiff are true.

The loan and capital grant contract relating to the University-Euclid Urban Renewal Area Project was signed by the City of Cleveland and the United States of America on November 15, 1962. Part I consists of 17 pages; it incorporates by reference Part II which contains 47 pages of standard terms and conditions. The contract at numerous points makes it evident that the acquisition of land is solely the responsibility of the local public agency. Section 103 of Part II contains provisions related to supervision and inspections. Under these:

> The Government shall have the right to inspect, to the extent deemed necessary by the Administrator, all Project work. The Administrator will inform the Local Public Agency of any noncompliances, with respect to such work, observed by the Administrator in the course of such inspections, but will not issue

> any orders or instructions to any contractors or subcontractors on such work. The Local Public Agency will take all steps necessary to assure that, for the purposes of this Contract, the Government is permitted to examine and inspect all project work, and all contracts, materials, equipment, payrolls and employment conditions pertaining to such work, including all relevant data and records.

The limitations of the Government's right of inspection are evident. It has the right of inspection but the correction of any noncompliances must be dealt with through the local public agency. Specifically, the Government is forbidden from issuing any orders or instructions to contractors on the job. Thus, the contract, between the United States Government and the City of Cleveland relating to the University-Euclid Urban Renewal Area Project, while providing for the right of government inspection of the project, was clearly only intended to benefit the Government in fulfilling its duty to see that federal funds are properly spent. This language of the contract imposes no duty of inspection, from which either an owner of property or other private person could derive a private right of action against the Government.

Section 102 of Part II of the urban renewal contract states that:

> The Local Public Agency will carry out the Project with all practicable dispatch, in a sound, economical and efficient manner. . . .

Once again this provision is for the benefit of the Government, not any private individual. Section 305 of Part II provides the Government with rights and remedies in event of defaults in payment of principal or interest on loans made to a local public agency. Yet not even this

section empowers the Government to employ remedies (such as appointment of a receiver or taking over management of the project) if there is any failure on the part of a local public agency to "carry out the project with all practicable dispatch."

Hence, neither Section 102 nor any other section of the contract nor the Housing Act itself, contains any provision which upholds or substantiates the plaintiff's claim of negligence "that the defendant United States did not properly plan, supervise and execute the urban renewal project so as to see that the properties in the project area were rapidly acquired by the City of Cleveland after the renewal plan was adopted."

Finally, Section 707 of the contract expressly negatives any possible intent to benefit any third person by reason of the Government's participation in the urban renewal project.

Analysis of the University-Euclid Urban Renewal Area contract makes it evident why it is that "The federal courts have consistently held that those not parties to the contract have no standing to enforce conditions imposed on redevelopment agencies by the United States, although those suing would benefit from such enforcement." *Johnson v. Redevelopment Agency of City of Oakland, Cal.*, 317 F. 2d 872, at 874 (9th Cir. 1963).

Comparably, *Harrison-Halsted Com. Group v. Housing & Home Fin. Agency*, 310 F. 2d 99, at 104 (7th Cir. 1962) holds that the provisions and regulations of a subsidy application entered into between the Housing and Home Finance Agency and the Chicago Land Clearance Commission did "not confer legal rights upon plaintiffs, as individuals, separate from their position as members of the general public."

Plaintiff on behalf of his bankrupt, therefore, can claim no duty to it arising under the Housing Act of 1949 or under the loan and capital grant contract between the United States of America and the City of Cleveland as the basis for the tort claims that he now presses against the United States. The position of plaintiff's bankrupt is identical to that of the plaintiff in *Mahler v. United States*, 306 F. 2d 713, at 721 (3rd Cir. 1962). There the Third Circuit Court of Appeals pointed out that:

> [I]n enacting the provisions respecting approval and inspection by the federal government, it was not the intention of Congress to impose a duty on the Secretary of Commerce, on the Bureau of Public Roads, or on the United States or any of its agencies, to make sure that a member of the travelling public, a user of a federal-aid highway, was not injured because of negligence in carrying out these provisions. The concern of Congress was to make sure that federal funds were effectively employed and not wasted.

Absent a duty of due care to plaintiff's bankrupt by the United States, owed to the same extent as a private individual under like circumstances, either as a common law duty, or as a duty arising under the Housing Act of 1949 or under the University-Euclid Urban Renewal Area Contract, it is found and determined that the claims of negligence against the United States are legally insufficient.

Defendant United States in support of its motion for summary judgment asks the court to consider several exceptions to the application of the Federal Tort Claims Act, 28 U.S.C. 1346(b) (1964). The complete list of the exceptions appears in 28 U.S.C. § 2680 (1964). Title 28 U.S.C. § 1346(b) (1964) waives sovereign immunity with

respect to negligence claims against the United States; and 28 U.S.C. § 2680 (1964) restores the waiver to the types of claims there specified. Thus, Title 28 U.S.C. § 2680 (a) (1964) excepts:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulations, . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Interpreting the "discretionary" exception the Supreme Court has decided that the United States is not liable for decisions made "at a planning rather than operational level." This explanation of the meaning of "discretionary function or duty" was first declared in *Dalehite v. United States,* 346 U.S. 15, at 42 (1953). Later, in *Indian Towing Co. Inc. v. United States,* 350 U. S. 61, at 64 (1955), the Supreme Court in applying 28 U.S.C. § 2680(a) (1964), "the discretionary function or duty" exception, said:

> The question is one of liability for negligence at what this Court has characterized the "operational level" of governmental activity. *Dalehite v. United States,* 346 U. S. 15, 42.

Concededly, the distinction between the planning and the operational levels of governmental activity is a difficult one. As *United States v. Hunsucker,* 314 F. 2d 98, at 104 n.11 (9th Cir. 1962) says in a footnote:

> The Supreme Court furnished no criteria as to what is activity at the operational level. From the cases considered, the question would seem to be whether

> in the light of the facts presented imposition of liability on the government would be consonant with the purposes of the Act.

The claims of negligence against the United States are quite general and indefinite. No act or omission of the United States is identified as to its time or its character. No claim is made that would qualify as operational negligence. This is understandable. The University-Euclid Urban Renewal Area contract makes it evident that the acquisition of land and the entire operation of the project is the function and the responsibility of the City of Cleveland. This allocation of local responsibility is in keeping with the aim and provisions of the urban renewal law.

The core of the plaintiff's claim against the United States is the latter's alleged failure to "see to it that properties in the project area were rapidly acquired by the City of Cleveland after the renewal plan was adopted." It has been seen that neither the urban renewal law nor the University-Euclid Urban Renewal Area contract provides any basis for this claim of negligence. However, even if this claim were legally sufficient it clearly deals with a "discretionary function or duty" under the admonition of *Dalehite, supra,* that:

> the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. *Dalehite, supra,* at 35-36.

It is determined that under the pleadings, the Housing Act of 1949, and the urban renewal contract which governs the University-Euclid Urban Renewal Project, the

claims of negligence which plaintiff brings against the United States are within the "discretionary function or duty" exception provided by 28 U.S.C. § 2680(a) (1964) and, therefore, not actionable against the United States under the Federal Tort Claims Act.

Defendant United States also invokes exceptions in 28 U.S.C. § 2680(h) (1964): "misrepresentation . . . or interference with contract rights." Plaintiff's counsel correctly urges that neither Ohio nor the general tort claims law recognizes a negligent interference with a contractual relationship. Nor is "misrepresentation" a negligent act. There is no claim of any conduct other than negligence in the complaint. Hence, the claimed exceptions of 28 U.S.C. § 2680(h) (1964) are inapplicable to the contentions of plaintiff's amended complaint.

Plaintiff's counsel argues that:

> The Motion of the defendant, the United States, For Summary Judgment deals solely with that portion of the plaintiff's cause of action arising under the Federal Tort Claims Act and based on a cause of action for negligence in the conduct of both defendants. The Motion completely overlooks the allegations of paragraphs 32, 33 and 34 of the Complaint based on a denial of constitutional rights.

In its reply brief, defendant United States points out that any claims for a taking of property by the United States without just compensation is founded upon the Constitution. It is pointed out "The district courts of the United States have jurisdiction to hear claims for taking of property by the United States without just compensation only where the amount sought does not exceed $10,000. For claims in excess of $10,000 jurisdiction lies exclusively in the Court of Claims. 28 U.S.C. 1491(1)."

As pointed out in *Myers v. United States*, 323 F. 2d 580 (9th Cir. 1963), this court does not have jurisdiction of any claim in excess of $10,000 against the United States for a taking of property by the United States without just compensation.

In accordance with the foregoing memorandum it is ordered that:

(1) The motion of the defendant United States for summary judgment is sustained. The complaint is dismissed as to defendant United States.

(2) The motion of the defendant City of Cleveland to dismiss the complaint is denied, considering and treating said complaint as a claim of abuse of eminent domain proceedings by the City of Cleveland, causing the properties of the plaintiff's bankrupt to be taken without just compensation in violation of the fourteenth amendment.

(3) Treating the motion of the City of Cleveland to include and embrace a motion to strike, the plaintiff will be directed to file a second amended complaint in conformity with this memorandum. Included, but not limited to, are specific directions to:

(a) Omit any and all claims relating to or based on a theory of negligence.

(b) Omit any and all claims of loss or deprivation of income of the plaintiff's bankrupt. Incidental or consequential damage of this type is not a permitted element of damage in an action of this type. See *R. J. Widen Company v. United States*, 357 F.2d 988 (Ct. Cl. 1966).

(c) Omit any and all claims relating to the defendant United States of America.

/s/ WILLIAM K. THOMAS
United States District Judge

MEMORANDUM AND ORDER OF DISTRICT JUDGE BEN C. GREEN

(Filed December 18, 1972)

Case No. C66-788

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MAURICE M. SAYRE, Trustee in Bankruptcy of
The Liberty Mortgage Corporation,
Plaintiff

vs.

THE CITY OF CLEVELAND,
Defendant

MEMORANDUM AND ORDER

GREEN, *J.*:

Plaintiff, trustee in bankruptcy for the Liberty Mortgage Corporation (hereinafter Liberty), began this action by filing a complaint against the present defendant, The City of Cleveland, and the United States. The United States was subsequently dismissed as a party defendant and the original complaint was amended, both pursuant to order of Judge Thomas. *Sayre v. United States,* 282 F.Supp. 175 (N.D. Ohio, 1967).

The amended complaint now before this Court alleges that in 1961 the City of Cleveland adopted a neighborhood renewal plan and an urban renewal plan known respectively as the University-Euclid General Neighborhood Renewal Plan (hereinafter University-Euclid) and the Uni-

versity-Euclid Urban Renewal Plan (hereinafter Project No. 1), and that pursuant thereto, declared the areas incorporated within said projects "to be a slum, blighted, deteriorated, and deteriorating . . ." At that same time, Liberty "was, and had been, engaged in the business of owning, managing and operating residential properties," many of them located within the areas previously mentioned.

According to 42 U.S.C. § 1441 et seq., certain requirements and procedures must be followed in order for a local urban renewal program to be eligible for federal funding. Pursuant thereto, the Act spells out two types of programs which are relevant to this case. The first is a General Neighborhood Renewal Plan, defined as:

> . . . a preliminary plan . . . which outlines the urban renewal activities for the area involved . . . and indicates generally . . . any portions of the area contemplated for clearance and redevelopment. 42 U.S.C. § 1452(d).

Such a General Neighborhood Renewal Plan:

> . . . may be prepared for an area consisting of an urban renewal area or areas, together with any adjoining areas having specially related problems, and which is of such size that the urban renewal activities in the urban renewal area or areas may have to be initiated in stages . . . 42 U.S.C. § 1452(d).

The University-Euclid Plan was such a plan.

The second type of program is an Urban Renewal Plan defined as:

> . . . a plan . . . which . . . shall conform to the general plan of the locality as a whole . . . and shall be suffi-

> ciently complete to indicate . . . such land acquisition . . . as may be proposed to be carried out in the urban renewal area . . . 42 U.S.C. § 1460(b).

Project No. 1, which is located entirely within the boundaries of University-Euclid, was such a plan.

The amended complaint further alleges that:

> . . . the defendant caused to be made prominent and frequent public announcements and publication through all local media of public communication that the real properties [in the said areas] . . . were the subject of imminent governmental action in the form of appropriation and rehabilitation by the defendant, and that occupants and residents of said properties, unless voluntarily removing therefrom, would be forcibly removed by appropriate legal proceedings.

Plaintiff also alleges that the City of Cleveland:

> . . . well knowing and fully realizing that the amounts which the defendant would be required to pay for the appropriation of real properties within that area, including the properties of the plaintiff bankrupt, the defendant, from and after the enactment of Ordinance No. 1338-61, and at all times referred to in this Amended Complaint, failed to provide within the project area adequate police protection, failed to provide within the project area adequate maintenance of streets and sidewalks, failed to provide within the project area proper disposal of garbage and rubbish, litter and debris, failed to provide within the project area safe and sanitary conditions, public and private, failed to provide within the project area enforcement of housing and building codes and regulations, thereby accomplishing the deterioration of the area and the values of the real properties of plaintiff's bankrupt.

It is alleged that the foregoing was done by the defendant in order to depress real estate values in the affected area so that the City could acquire the properties within the project area at the lowest possible price.

The amended complaint concludes with the following:

> The described conduct of the defendant encouraged the decay and desertion of the area and constituted a taking and appropriation of the properties of plaintiff's bankrupt for which no compensation whatsoever was offered, or intended to be offered, by the defendant and a taking and appropriation of said properties in violation of the provisions of the Fifth Amendment to the Constitution of the United States and of the Fourteenth Amendment to the Constitution of the United States.
>
> By the 2nd of November, 1964, some three and one-half years after the commencement of the execution of the Hough area project, the defendant had taken steps to acquire not more than twelve out of scores of properties belonging to plaintiff's bankrupt in said area, and had completed acquisition of not more than one or two of them.
>
> As a direct and proximate consequence of the conduct of the defendant described in this Amended Complaint, plaintiff's bankrupt, the Liberty Mortgage Corporation, was declared bankrupt on the 2nd day of November, 1964.
>
> Commencing with the issuance by the defendant of notices to plaintiff's bankrupt and to the residents and occupants of premises owned by plaintiff's bankrupt, shortly following the enactment of the ordinance hereinabove referred to, and continuing for a period of approximately five years thereafter, the defendant de-

prived plaintiff's bankrupt and deprived the plaintiff, as trustee for said bankrupt, of the full use, benefits and rights of ownership in the properties of said bankrupt abovementioned, to such an extent as to amount to a taking for which just compensation is required to be paid under the Fifth Amendment to the Constitution of the United States.

The compensation and damages to which plaintiff's bankrupt is entitled by reason of the foregoing is in the amount of Ten Million Dollars ($10,000,000.00).

WHEREFORE, plaintiff prays for judgment against the defendant in the amount of Ten Million Dollars ($10,000,000.00) and all costs of this action.

Defendant now moves this Court for summary judgment. This motion is based primarily on the answers to defendant's interrogatories, particularly interrogatory No. 10, which asked:

State the street address and Cuyahoga County Auditor's Permanent Parcel Number of each parcel of real property of Liberty Mortgage Corporation which plaintiff claims in the Amended Complaint was taken (*in toto* or *pro tanto*) by the defendant.

Based on plaintiff's listing of 194 properties in response to this interrogatory defendant has divided the properties into four groups: (1) 78 properties located entirely outside the boundaries of both University-Euclid and Project No. 1; (2) 14 properties located outside the boundaries of Project No. 1 but within the boundaries of University-Euclid; (3) 29 properties located within the boundaries of Project No. 1, but already acquired by the City; and (4) 73 properties located within the boundaries of Project No. 1, but never having been the subject of eminent domain proceed-

ings.[1] Defendant now seeks summary judgment as to each of these groups of property, applying separate arguments in support thereof as to each.

As to the first group of properties, defendant argues that it cannot be liable for properties situated outside a planned urban renewal area. For the second group of properties, defendant argues that preliminary planning is not a taking in the constitutional sense. The third group of properties, continues defendant, cannot be collaterally attacked in this suit because of the doctrine of res judicata and estoppel. Finally, the fourth group of properties represent no taking in the constitutional sense in that the City has exercised no official action in its power of eminent domain.

Plaintiff contends that the grant of summary judgment in any respect would be, in effect, a reversal of a prior ruling in this action by Judge William K. Thomas, *Sayre v. United States*, 282 F. Supp. 175 (N.D. Ohio, 1967). Plaintiff maintains that Judge Thomas has already held that it has right of recovery for all properties identified, provided that the facts alleged in the amended complaint can be proven.

Plaintiff has misconstrued Judge Thomas's ruling in this case, and the federal case law dealing with abuse of eminent domain powers. Judge Thomas did not hold that plaintiff had a right to recover based upon *all* allegations in the complaint before him. He did rule that:

> . . . it is the law of this circuit that a municipality's claimed abuse in its exercise of the power of eminent

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1. An affidavit of Frederick E. J. Pizzadez, Executive Commissioner of the Department of Community Development of the City of Cleveland, has been submitted to this Court concerning the boundaries of University-Euclid and Project No. 1 and the locations of the 194 properties of Liberty in relation to said boundaries.

> domain, with the claimed result of taking of private property without just compensation, presents a question of federal jurisdiction which a federal district court must hear and determine. (*Sayre*, supra, at p. 183).

He further explicitly held that many of the allegations contained within the plaintiff's complaint did not state claims for relief cognizable by the federal courts.

The jurisdiction of the federal courts in a case such as this is limited to the determination of whether the municipality abused its powers of eminent domain in order to effect a *pro tanto* taking of property. Upon a finding that such was the case, the courts have awarded the property owner the differential between the property's fair market value and its diminished value. However, no right of recovery has been recognized for such factors as loss of business or profits. *Woodland Market Realty Co. v. City of Cleveland*, 426 F.2d 955 (CA 6, 1970); *Foster v. City of Detroit*, 254 F.Supp. 655 (E.D. Mich., 1966), aff'd 405 F.2d 138 (CA 6, 1968); *R. J. Widen Co. v. United States*, 357 F.2d 988 (Ct. Cl., 1966). *See also, Malloy v. Hogen*, 378 U.S. 1 (1964), interpreting *Chicago, B. & O. R.R. v. Chicago*, 166 U.S. 226 (1897). The rule applied is basically that in *United States v. Perry Motor Co.*, 327 U.S. 372, 377-378 (194[illegible]):

> . . . it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called "market value." . . . Since "market value" does not fluctuate with the needs of the condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential

losses are refused in federal condemnation proceedings. *Id.*, at 377-378.

Judge Thomas recognized this rule when he considered the City of Cleveland's motion to dismiss and ordered plaintiff to:

> Omit any and all claims of loss or deprivation of income of the plaintiff's bankrupt. Incidental or consequential damage of this type is not a permitted element of damage in an action of this type. (*Sayre*, supra, at p. 192).

Therefore, plaintiff's claim for damages from the City of Cleveland for causing Liberty to be declared bankrupt is contrary to Judge Thomas's order and will not be considered by this Court. It is quite clear that Judge Thomas limited the jurisdiction of this Court to determining whether or not the City of Cleveland has "taken" any or all of bankrupt's properties. Judge Thomas then added:

> Should the plaintiff eventually establish his claim on the merits it might then become necessary to decide whether the plaintiff is without remedy, as he claims, in the state courts under Ohio's laws and controlling decisions. At such a time City of Cleveland v. Carcione, [118 Ohio App. 525, 190 N.E. 2d 52 (1963)], would be considered. Depending upon the conclusion this court could then determine whether it should grant or abstain from granting the relief sought. *Sayre*, supra, at p. 186.

Having determined that the present action is limited to a determination of whether or not the defendant City of Cleveland has taken property without just compensation in violation of the Fifth and Fourteenth Amendments, the Court will now turn to the issues raised by defendant's

motion pertinent thereto. This aspect of the action will be approached as set forth by defendant's categorization of the 194 properties specified by plaintiff as having been taken by the City.

The first group of properties to be considered consists of 78 enumerated parcels all located beyond the boundaries of University-Euclid and Project No. 1. In the *Woodland Market* case, supra, the Sixth Circuit Court of Appeals was presented with the question of:

> . . . whether a property owner having property adjacent to an urban renewal project may maintain an action for compensation under the Fifth and Fourteenth Amendments of the Federal Constitution for depreciation in the value of his property by reason of the establishment of the project. 426 F.2d at p. 959.

The Court ruled that no recovery could be had. This Court will, therefore, grant summary judgment as to all properties lying outside the boundaries of University-Euclid and Project No. 1 areas.

Next, defendant argues, as to 14 properties located outside of Project No. 1 but within University-Euclid, that preliminary plotting or planning on a map in and of itself does not constitute taking within the constitutional sense. That may well be. However, plaintiff alleges that defendant has gone beyond preliminary planning and taken action which "constituted the initial steps in the appropriation of the property of plaintiff's bankrupt" and had withdrawn municipal services in the area. Since plaintiff has made a claim upon which relief could be granted under the prior ruling of Judge Thomas and the proposition of law relied upon by defendant does not reach the issues raised by plaintiff in the amended complaint, the Court

must deny defendant's motion for summary judgment as to this group of properties.

The third group of properties as to which summary judgment is sought are 29 parcels acquired either by voluntary negotiation (25), appropriation (3), or sheriff's sale (1).

It is well settled that a property owner who voluntarily negotiates a sale of his property with the government, even where condemnation proceedings are threatened, cannot thereafter seek relief in federal court. *Beistline v. City of San Diego*, 256 F. 2d 421 (CA 9, 1958). Even though defendant's affidavit indicates that the City acquired all but one of the properties by negotiation after Liberty was declared bankrupt, these properties cannot now be subject to review by this Court. Sale by negotiation implies voluntariness and plaintiff has made no allegation that these sales were other than voluntary. Therefore, the Court will grant summary judgment as to those properties acquired by negotiation.

A property owner who has been awarded compensation through condemnation proceedings may not thereafter collaterally attack that decision in federal court. *Annat v. Beard*, 277 F. 2d 554 (CA 5, 1960), *cert. den.* 364 U.S. 908 (1960). Consequently, as to the three properties previously acquired by the City of Cleveland through condemnation proceedings, plaintiff's proper remedy was a direct appeal through the state courts. *City of Cleveland v. Carcione*, 118 Ohio App. 525, 190 N.E. 2d 52 (1963). Therefore, the Court will grant summary judgment as to those properties previously acquired by the City through condemnation proceedings.

With regard to the property acquired by the City through Sheriff's sale, there is insufficient evidence avail-

able to the Court at this time to determine whether or not plaintiff's Fifth and Fourteenth Amendment rights were protected in those proceedings. The sale was an involuntary one after the Liberty bankruptcy and it is possible that the value received was not reflective of the compensation to which plaintiff would have been entitled if he is correct in his allegations concerning the City's conduct affecting property values. Summary judgment will be denied on that parcel.

Finally, defendant seeks summary judgment as to properties located within Project No. 1 which "have never been the subject of any resolution of necessity adopted by the Council of the City declaring an intention to appropriate, and which have never been the subject of eminent domain proceedings." Defendant's theory in support of this branch of the motion is that there has been no "taking" of those properties. That contention disregards the fact that the amended complaint alleges that the City of Cleveland has abused its power of eminent domain so as to take Liberty's property without just compensation. As plaintiff has stated a claim for relief as to which there exists a genuine issue of material fact, the Court must deny this branch of defendant's motion.

In summary, the Court will grant summary judgment as to all properties located beyond the boundaries of the University-Euclid project area and as to all properties which have been conveyed by negotiated sale or through condemnation proceedings. The Court will also enter summary judgment on plaintiff's claim for relief premised on general damage to the bankrupt corporation and/or reflecting any claim for recovery of consequential losses. Trial in the within action will be restricted to the issue of whether the defendant was guilty of a *pro tanto* taking of properties owned by Liberty, as identified by plaintiff

in response to interrogatory No. 10, within the boundaries of University-Euclid and not otherwise excluded under the ruling herein.

IT IS SO ORDERED.

/s/ BEN C. GREEN
United States District Judge

MEMORANDUM AND ORDER OF DISTRICT JUDGE BEN C. GREEN

(Filed January 31, 1973)

Case No. C66-788

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MAURICE M. SAYRE, Trustee in Bankruptcy of The Liberty Mortgage Corporation,
Plaintiff

vs.

THE CITY OF CLEVELAND, et al
Defendants

MEMORANDUM AND ORDER

GREEN, *J.*:

The defendant, City of Cleveland, has moved for reconsideration of this Court's order of December 18, 1972, in which the Court granted in part and denied in part the defendant's motion for summary judgment.

In the motion for reconsideration the defendant argues that the Court improperly denied the City's motion, relying upon allegations in the plaintiff's complaint. The defendant correctly states that when a motion for summary judgment is supported by affidavits as provided in Rule 56, Federal Rules of Civil Procedure, an adverse party may not rely upon the allegations of a pleading in opposition thereto. The flaw in the defendant's argument is that

when the submissions of the party seeking summary judgment do not go to issues raised in the pleading, they cannot be considered as controverting the issues so made out. In this case the plaintiff has alleged that the City abused its powers of eminent domain. The affidavits submitted by the defendant are not responsive to those allegations. Consequently, there still exists an issue of fact as to whether the City did abuse its powers of eminent domain.

The alternate argument contained in the motion for reconsideration is, quite simply speaking, based upon a view of the law contrary to that as set forth in the Court's memorandum and in the previous ruling entered by Judge Thomas in this case. The Court has applied the law as it believes proper, and the fact that defendant may not agree with that interpretation is no basis for reconsideration of the prior order.

Defendant has requested that, in the event the Court denied the instant motion, the prior order be certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). In the Court's opinion consideration by the Court of Appeals of the present question of law would be advisable. It appears to the Court that trial on the question of liability will be lengthy. Should plaintiff prevail, extended hearings (perhaps before a Special Master) might be required to determine damages. The City's potential exposure is substantial, and could pose some municipal budgetary problems. If the defendant is correct in its view of the law, all of the foregoing burdens on the parties and the court would be alleviated.

The Court's order of December 18, 1972 will, therefore, be amended by the incorporation, nunc pro tunc, therein of a finding that the order involves a controlling

question of law as to which there is substantial ground for difference of opinion and that an immediate appeal therefrom may materially advance the ultimate termination of the litigation.

IT IS SO ORDERED.

/s/ BEN C. GREEN
United States District Judge

OPINION OF UNITED STATES COURT OF APPEALS

(Filed March 14, 1974)

No. 73-1594

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAURICE M. SAYRE,
Trustee in Bankruptcy of The Liberty
Mortgage Corporation,
Plaintiff-Appellee,

v.

THE CITY OF CLEVELAND,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Ohio, Eastern Division.

Before: McCREE and MILLER, *Circuit Judges,* and McALLISTER, *Senior Circuit Judge.*

MILLER, Circuit Judge. This appeal raises important questions concerning the extent to which property may be affected by an urban renewal program without being "taken" within the meaning of the fifth and fourteenth amendments to the Constitution of the United States. The facts and procedural history of the case are somewhat complex and require a not incomplete statement.

The appellee, Maurice Sayre, is the trustee in bankruptcy of Liberty Mortgage Corporation. In November of 1966 appellee brought an action against the City of

Cleveland for damages for loss of income, earnings and property caused by the City's negligence in conducting certain aspects of its urban renewal program.[1] The City moved to dismiss, and soon thereafter the appellee amended his complaint to allege that the City had in fact taken Liberty Mortgage's property without compensation in violation of the fifth and fourteenth amendments to the United States Constitution. Specifically, the amended complaint alleged that the City had notified Liberty Mortgage and occupants of certain of its properties of the City's intention to appropriate numerous parcels of real property owned by Liberty Mortgage. These actions of the City were said to have "constituted the initial steps in the appropriation of the property of plaintiff's bankrupt, which appropriation the defendant City never carried to completion and which said defendant at no time had the facilities or ability to consummate." Moreover, in the Brief of Plaintiff in Response to Reply Brief of Defendant City of Cleveland, appellee alleged that the "initial steps" taken by the City were the passage of a resolution by the city council declaring its intent to appropriate certain parcels of Liberty Mortgage's property and the subsequent issuance of written notices in conformance with the procedures required under Ohio law for appropriation of property by a municipal corporation. Ohio Revised Code §§ 719.04 and 719.05.

Treating the motion for dismissal as including a motion to strike, the district court ordered appellee to file a second amended complaint, but to omit claims based on negligence and claims for incidental or consequential damages. *Sayre*

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1. Originally the United States was also a party; however, the action against the government was dismissed by the district court early in the proceedings. That dismissal is not involved in this appeal.

v. United States, 282 F.Supp. 175 (N.D. Ohio 1967). However, appellee was permitted to maintain his claim that the City of Cleveland had abused the eminent domain proceedings and taken properties of Liberty Mortgage without just compensation. Fundamental to the decision is the reliance by the district court on appellee's allegation that the City intended to appropriate these properties and, in fact, had already begun the condemnation procedures. These allegations presented questions concerning the abuse of the power of eminent domain which this Court in *Foster v. Herley*, 330 F.2d 87 (6th Cir. 1964), said was a sufficient basis for the exercise of federal jurisdiction. The following language of the district court is instructive as to its thinking:

> Under Foster v. Herley, supra, it is the law of this circuit that a municipality's claimed abuse in its exercise of the power of eminent domain, with the claimed result of taking private property without just compensation, presents a question of federal jurisdiction under the fourteenth amendment which a federal district court must hear and determine. Plaintiff's amended complaint in charging the defendant City with conduct which tends to state an abuse in the exercise of the power of eminent domain presents a federal jurisdictional question under the fourteenth amendment as interpreted in Foster v. Herley, supra. 282 F.Supp. at 183.

An examination of our opinion in *Foster v. Hurley*, 330 F.2d 87 (6th Cir. 1964), and the district court's opinion on remand, *Foster v. City of Detroit*, 254 F.Supp. 655 (E.D. Mich. 1966), *aff'd* 405 F.2d 138 (6th Cir. 1968), is crucial to an understanding of the holding of the district court. Foster owned three tracts of land in the City of Detroit. In 1950 the City notified him that it intended

to condemn his property and that in the meantime he should do nothing either to maintain or improve the property. A few months later the City instituted formal condemnation proceedings and placed a *lis pendens* against all property in the area. Additionally, the Detroit Common Council passed a resolution freezing the use and management of the property and prohibiting any new buildings or improvements without special permission of council. Despite these initial steps, the condemnation process was never completed; in June of 1960 the City dismissed the proceedings and removed the *lis pendens*. But during this ten year period Foster's property deteriorated because of the apparently imminent condemnation: it became extremely difficult to find tenants for his rental property; vandals looted the empty buildings and fire insurance was cancelled. The entire neighborhood suffered similar problems. Then in 1958 the City informed Foster that because of the delapidated condition of the buildings, they would have to be demolished at his expense. This was done, and Foster was left in debt with three empty parcels of land. Finally, in 1961 Foster learned that the City was again considering condemnation—this time under the Federal Urban Renewal Program. The new appraisals on the property were at its depreciated, 1961, value.

Foster filed suit in the United States District Court, alleging that the City had abused its power of eminent domain and had so deprived the plaintiff of his use and enjoyment of the property that there was a taking of the property without compensation. The district court dismissed the action because it found that there could be no taking unless the condemnation process was completed and title passed to the City. Once plaintiff's claim under the fourteenth amendment was lost, he was left with a tort action against the City—a cause of action

which the federal court did not have jurisdiction to hear since there was no diversity of citizenship. On appeal this Court reversed, holding that pursuant to 28 U.S.C. § 1331, the district court had jurisdiction to hear the merits of the case and then determine whether plaintiff had a valid cause of action under the fourteenth amendment.

The district court on remand heard the case on the merits, finding in favor of the plaintiff. The actions of the City—initiating the condemnation proceedings, refusing to allow improvements and permitting years of delay in the proceedings—were, at the very best, major contributing causes of the decline in value of the area in general and of the plaintiff's property in particular. Although the condemnation process was never formally completed, the City had effectively "taken" plaintiff's property within the meaning of the fifth and fourteenth amendments and was therefore liable for just compensation. This Court affirmed the district court's decision although our opinion was directed mainly to procedural issues raised by the City on appeal.

In the present case the City of Cleveland, after the denial of its motion for dismissal, prepared written interrogatories for appellee to answer. Specifically, the City requested appellee to list those properties which it believed had been taken by the City. Appellee responded by naming 194 properties. In August of 1972, the City moved for summary judgment. Accompanying this motion was the affidavit of Frederick Pizzedaz, Executive Commissioner of the Cleveland Department of Community Development. Pizzedaz stated that none of Liberty Mortgage's properties involved in the current appeal had been the subject of any council resolution of intent to appropriate for the general neighborhood planning area or the

urban renewal project area.[2] Neither had any of said properties ever been designated for appropriation for the urban renewal project nor had any of said properties been the subject of an eminent domain proceeding.

The district court granted summary judgment for the City on 107 of the 194 properties: 29 of the properties were found to have been previously acquired by the City, and 78 were found to be entirely outside the General Neighborhood Renewal Plan Area and not where the urban renewal activity, of which appellee complained, had occurred. But for the remaining 87 properties—those within the General Neighborhood Renewal Plan Area—summary judgment was denied. The district court did not elaborate on its reasons for denying the motion other than to hold that the complaint stated a claim upon which relief could be granted. Also the court stated that appellee had "stated a claim for relief as to which there exists a genuine issue of material fact. . . ." Unfortunately, the memorandum opinion does not state which facts, crucial to the decision, are in dispute. It is from the denial of summary judgment on these 87 properties that the City of Cleveland brings this appeal.[3]

Post-war concern over decaying central cities and blighted neighborhoods led to the passage of the Housing Act of 1949, 42 U.S.C. Sec. 144, *et seq.*, and the Housing Act Amendments of 1954, 42 U.S.C. Secs. 1450-62. Briefly stated, the purpose of these programs was to provide financial assistance to communities in order that they might

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2. Twenty-nine properties formally belonging to Liberty Mortgage were acquired by the City either through negotiation, sheriff's sale or appropriation. None of these properties is involved in this appeal.

3. The interlocutory order was properly certified for immediate appeal. An order permitting the appeal was entered by this Court.

clear slums and blighted areas and rehabilitate old houses where possible. Adequate planning, often a luxury for rapidly changing cities, was encouraged by the Acts, and federal loans were made available to finance the plans. Two types of plans are of particular importance to this appeal. The first, the General Neighborhood Renewal Plan (GNRP), is defined by the Act as follows:

> As used herein, a General Neighborhood Renewal Plan means a preliminary plan (conforming, in the determination of the governing body of the locality, to the general plan of the locality as a whole and to the workable program of the community meeting the requirements of section 1451 of this title) which outlines the urban renewal activities proposed for the area involved, provides a framework for the preparation of urban renewal plans and indicates generally, to the extent feasible in preliminary planning, the land uses, population density, building coverage, prospective requirements for rehabilitation and improvement of property, and any portions of the area contemplated for clearance and redevelopment.

The GNRP serves only as a starting point for planning decisions. The more detailed Urban Renewal Plan specifies the exact properties to be either cleared or rehabilitated; additionally, this plan serves as a basis for funding the renewal program. The Act provides:

> (b) "Urban renewal plan" means a plan, . . . for an urban renewal project, which plan . . . shall be consistent with definite local objective respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities, and other public improvements; and (2) shall be sufficiently complete to indicate, to the ex-

tent required by the Secretary for the making of loans and grants under this subchapter, such lands acquisition, historic and architectural preservation, demolition, and removal of structures, redevelopment, improvements, and rehabilitation as may be proposed to be carried out in the urban renewal area, zoning and planning changes, if any, land uses, maximum densities, and building requirements.

In 1961 the Cleveland City Planning Commission and the City Council approved a GNRP and an Urban Renewal Plan for certain blighted areas of the city. The GNRP encompassed an area in excess of 1,600 acres, but it was broken down into subareas I, II, III and IV, indicating the order in which the city would activate renewal plans within the GNRP area. Project I, the University-Euclid Urban Renewal Area Project, covering approximately one-half of the GNRP, was the only project ever adopted by the council, and the only one that was ever funded. A map of both the GNRP and Project I areas was submitted to the government along with the city's application for financial assistance; shaded areas indicated those properties that the city considered for possible appropriation. None of the properties involved in this appeal was designated on the map as a candidate for acquisition.

As already mentioned, the affidavit of Mr. Pizzedaz stated that none of the properties involved in this appeal had ever been designated for appropriation for the urban renewal project nor had any been the subject of an eminent domain proceeding. In his Supplemental Complaint, appellee alleged that the city "directed to the owners and occupants of specific real properties notice of the alleged intention of the defendant to acquire such real properties either by negotiation or by means of appropriate legal action." In the following paragraph appellee continued,

"notices of the nature referred to in the preceding paragraph were forthwith directed by defendant to the occupants and residents of almost all of the properties within the Hough area owned by plaintiff's bankrupt." When asked by interrogatory to specify the properties where these notices were received, the appellee listed only fourteen parcels—thirteen of which had already been acquired by the city through either negotiation or appropriation and are not involved in this appeal. One parcel had apparently been the subject of an inquiry by Liberty Mortgage to the City of Cleveland. A letter from the Project Director of the University-Euclid Urban Renewal Project to Liberty Mortgage stated that the property at 1628 Ansel Road "is being proposed for acquisition under a plan change." Mr. Pizzedaz's affidavit states that no eminent domain proceedings were ever initiated as to this property. No further explanation of this letter appears in the record. With the exception of this one letter the record is barren of any affidavits, interrogatories, or evidence of any kind that would support the allegations of appellee's complaint that the City began condemnation proceedings against those properties of Liberty Mortgage involved in this appeal. Quite the contrary, there is substantial support for the conclusion that the City neither intended to take, nor took, any action against any of these 87 properties.

This Court is no stranger to the troublesome legal issues that arise when cities undertake ambitious programs of urban renewal. In *Foster v. Herley, supra,* discussed at length above, we held that a taking may occur even before the city completes the formal procedures usually required before it may actually acquire title to property by condemnation. *See also Madison Realty Company v. City of Detroit,* 315 F.Supp. 367 (E.D. Mich. 1970). Once urban renewal is announced and certain areas are desig-

nated for condemnation, predictable changes will occur in the property to be appropriated. Since the owner is forbidden to make improvements, the property inevitably begins to deteriorate. Tenants move out, often leaving empty buildings for vandals who hasten the decline of the neighborhood. Mortgage money disappears while insurance rates soar. Whatever value the property may have had prior to the beginning of the project is rapidly diminished. *Foster* was a recognition that an urban renewal authority, by abusing its power of eminent domain, may cause such substantial damage to property that it is actually "taken" within the meaning of the fifth and fourteenth amendments.

But, lest *Foster* be misinterpreted, it should be read in conjunction with *Woodland Market Realty Company v. City of Cleveland,* 426 F.2d 955 (6th Cir. 1970). There, we considered whether property immediately adjacent to that to be appropriated, is actually taken because of a substantial drop in value caused by the urban renewal project. In finding there was no taking, we said:

> The action of the City has resulted in no diminution of the plaintiff's rights in its property. Its leasehold estate has remained intact. What has altered is the character of the neighborhood, not the character of the plaintiff's leasehold interest. Actions done in the proper exercise of governmental powers which do not directly encroach upon private property, though they may impair its use or value, do not amount to a taking of such property within the meaning of the constitutional provision that private property shall not be taken for public use without just compensation. 426 F.2d at 958.

Woodland Market acknowledges the authority of the legislative body to draw its own lines around the property

it wishes to condemn by eminent domain. And the crucial geographic boundary is not that around the general planning area or the project area, but around the property that the city has demonstrated that it intends to appropriate. Absent the abuse of eminent domain found in *Foster,* including some action by the city indicating that *the particular piece of property at issue* is to be appropriated, economic loss caused by urban renewal does not constitute a taking within the meaning of the fifth and fourteenth amendments.[4]

We are unable to find any judicial support for the broad proposition advanced by appellee in his brief that there is an unconstitutional taking whenever a city in the conduct of its urban renewal program commits acts that lead to the devaluation of property. The converse of this proposition is particularly true where the city, as in this case, has neither initiated eminent domain proceedings, evidenced any intent to begin procedures, or physically invaded the property. In fact, our reading of the cases indicates that this Court in *Foster* possibly broke new ground when it held that abuse of the condemnation authority could constitute a taking. More typically, courts have found that although there can be no taking until the condemnation process was completed, factors such as governmental delay and inaction may be considered in setting the crucial date for valuing the property. *See City of Cleveland v. Carcione,* 118 Ohio App. 525, 190

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4. We are aware that in *Madison Realty Company v. City of Detroit,* 315 F.Supp. 367 (E.D. Mich. 1970), a district court of this Circuit said that "[i]nitiation of eminent domain proceedings is not a requisite to a finding that a 'taking' has in fact occurred allowing for recovery by a property owner." 315 F.Supp. at 371. However, that case, like all others, is limited to its particular facts. The district court found in that case that the property owner had been notified by city officials that his land would be acquired. Furthermore, after considerable delay, the city initiated formal eminent domain proceedings.

N.E.2d 512 (1963); *City of Buffalo v. J. W. Clement Company,* 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895 (1971). *Also see,* generally, Recent Development, 72 Colum.L.Rev. 772 (1972). The rationale of these cases is that a de facto taking "requires a physical entry by the condemnor, or a physical ouster of the owner, or a legal interference with the physical use, possession or enjoyment of the property, or legal interference with the owner's power of disposition of the property." *City of Buffalo v. J. W. Clement Co., supra,* 321 N.Y.S.2d at 357.

Appellee has cited language in his brief to the effect that governmental action, without any legal proceedings, may constitute a taking. A closer examination of these cases reveals that they invariably arose in the context of either a physical invasion or physical restraint on the land—for example, repeated flooding, *Pumpelly v. Green Bag Co.,* 80 U.S. (13 Wall.) 166 (1871) and *United States v. Cress,* 243 U.S. 316 (1917); invasion of the airspace, *United States v. Causby,* 328 U.S. 256 (1946), and *Griggs v. Allegheny County,* 369 U.S. 84 (1962); and restriction of access, *Crawford v. Village of Delaware,* 7 Ohio St. 460 (1857), and *State ex rel. McKay v. Kauer,* 156 Ohio St. 347, 102 N.E.2d 703 (1951). Neither of these cases nor any of the others cited by appellee supports his contention that, absent physical invasion or any action on the part of the city to appropriate the Liberty Mortgage property, a taking has occurred because urban renewal activities of the city may have caused a decrease in property values.

The current posture of this case is an interlocutory appeal from an order denying summary judgment. We recognize the discretion of the district court in deciding motions under Rule 56 of the Federal Rules of Civil Procedure, *see Williams v. Howard Johnson's Inc. of Washington,* 323 F.2d 102 (4th Cir. 1963), and we are loathe to

overrule the court below when it has found that there is a genuine issue of material fact. Yet when a motion for summary judgment is filed by a defendant supported by affidavits and answers by plaintiff to interrogatories, showing that there is no genuine issue of material fact, with no counter affidavits or other materials being filed by the plaintiff, as was the case here, summary judgment should be granted. *See Liberty Leasing Co. v. Hillsum Sales Corp.*, 380 F.2d 1013 (5th Cir. 1967); *Surkin v. Charteris*, 197 F.2d 77 (5th Cir. 1952). It is significant that although the district court denied summary judgment as to the 87 properties, it did not indicate what facts it believed were in dispute.

However, absent the extreme circumstances present in the *Foster* case, but lacking here, we think the true rule is that there is no de facto taking of properties which have decreased in value because of an urban renewal project unless there is a physical invasion, damage or injury, or a restraint of some type, or action by the City to appropriate such properties. Essentially this was the holding of this Court in *Woodland Market Realty v. City of Cleveland*, *supra*, and the well-reasoned opinion of New York's highest court in *City of Buffalo v. J. W. Clement Company*, *supra*, as well as many other cases.

The order of the district court denying the City's motion for summary judgment with respect to the 87 properties involved in this appeal is therefore reversed. The action is remanded to the district court for entry of an order granting the said motion and dismissing the action.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS

(Filed March 14, 1974)

No. 73-1594

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAURICE M. SAYRE,
Trustee in Bankruptcy of the Liberty Mortgage Corporation,
Plaintiff-Appellee,

vs.

THE CITY OF CLEVELAND,
Defendant-Appellant.

Before: McCREE and MILLER, *Circuit Judges*, and McALLISTER, *Senior Circuit Judge.*

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded for entry of an order

granting the motion for summary judgment and dismissing the action.

It is further ordered that Defendant-Appellant recover from Plaintiff-Appellee, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

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Supreme Court of the United States

October Term, 1973
No. 73-1852

MAURICE M. SAYRE,
Trustee in Bankruptcy of The Liberty Mortgage Corporation,
Petitioner,

vs.

THE CITY OF CLEVELAND,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

GEORGE I. MEISEL
JAMES A. SMITH
ISAAC SCHULZ
SQUIRE, SANDERS & DEMPSEY
1800 Union Commerce Bldg.
Cleveland, Ohio 44115
Counsel for Respondent

Of Counsel:
HERBERT R. WHITING
Director of Law
ROBERT JONES
Assistant Director of Law
213 City Hall
Cleveland, Ohio 44114

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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Supreme Court of the United States

October Term, 1973
No. 73-1852

MAURICE M. SAYRE,
Trustee in Bankruptcy of The Liberty
Mortgage Corporation,
Petitioner,

vs.

THE CITY OF CLEVELAND,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals is now reported at 493 F.2d 64 (6th Cir. 1974) (Petitioner's Appendix A50-62). The 1972 opinion of the District Court is not reported (A35-46). Thereafter, the 1972 opinion was supplemented and modified by an unreported opinion (A47-49). The 1967 opinion of the District Court reported in 282 F. Supp. 175 and reproduced in the Petitioner's Appendix (A1-34) is of pertinence here only insofar as it provides background for the issue decided below.

JURISDICTION

The jurisdictional requisites adequately appear in the Petition.

QUESTION PRESENTED FOR REVIEW

Petitioner's two questions are really one. They overstate the holding of the Court of Appeals. The second so-called question tautologically assumes the answer to the question posed, that is—that a "de facto" taking has occurred. Properly stated, the question presented is:

> Absent physical invasion, do the fifth and fourteenth amendments to the United States Constitution require a city to pay for a decline in the market values of numerous parcels of real property located within the boundaries of a general neighborhood planning area and an urban renewal project area when the undisputed facts show that the city has never designated such properties for acquisition as part of the urban renewal project and has never taken any step, as required by state law, to commence eminent domain proceedings against such properties?

The Court of Appeals answered this question "No". Respondent submits that the answer of the Court of Appeals is correct and should not be reviewed.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are set out in the Petition.

COUNTER STATEMENT OF THE CASE

In the early 1960's Council of the City of Cleveland approved a preliminary plan for proposed urban renewal activities designated "University-Euclid General Neighborhood Renewal Plan" ("GNRP"). The area of the GNRP encompassed approximately 1,633 acres of the City's blighted east side. The purpose of the GNRP was to provide "a framework" "to facilitate proper preliminary planning" for "the urban renewal activities proposed for the area involved" (42 U.S.C. §1452(d)). The GNRP itself was a planning device, not an urban renewal project. Within the boundaries of the GNRP, four areas were marked out for possible urban renewal projects.

Only one of those planning areas became an approved, funded and implemented urban renewal project. This was the "University-Euclid Urban Renewal Plan" ("Project I") the area of which was approximately one-half of the area of the preliminary GNRP. In the Project I area, rehabilitation was to be accomplished through a variety of means, including programs stimulating the repair or maintenance of private property by private owners. Less than 10% of the properties in the project area were designated in the Project I plan for acquisition by the City. None of Petitioner's 87 properties involved in the discretionary appeal to the Court of Appeals was included in the Project I plan for public appropriation.

Petitioner filed this action on November 1, 1966 against the Respondent City and the United States.[1] Petitioner's bankrupt, the Liberty Mortgage Corporation, formerly was engaged in the widespread buying and selling

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1. The United States was dismissed by the District Court. Petitioner did not appeal that decision.

of residential properties in Cleveland's blighted east side. The complaint was founded entirely in tort. Respondent moved to dismiss on the grounds of sovereign immunity and lack of diversity. Before the court ruled on the motion, Petitioner filed a "Supplement to Complaint".[2] In Petitioner's briefs filed in opposition to the motion to dismiss, Petitioner informed the court that the supplement was specifically framed to state a claim of a taking of property as such a claim was recognized in the 1964 decision of the Court of Appeals in *Foster v. Herley,* 330 F.2d 87 (6th Cir.). In attempting to articulate a *Foster*-type claim, the supplemental pleading asserted that Respondent had taken "the initial steps in the appropriation of the property" of Petitioner. In his brief elaborating upon the meaning of the supplementary pleading, Petitioner stated that the complaint as amended in effect alleged that the City had taken the steps required by Ohio law to commence eminent domain proceedings (that the City Council had adopted a resolution declaring the intention to appropriate Petitioner's properties and had caused written notices to be issued against those properties). The pleadings in effect alleged that after the City invoked the use of the power of eminent domain against Petitioner's properties, the City stayed the legal processes while it deliberately engaged in extra-legal activities for the purpose of driving down the market price of Petitioner's properties.

At this early stage, the District Court had no evidence before it. In overruling the City's challenge to the sufficiency of Petitioner's pleadings expressly fashioned to fall within the *Foster* doctrine, the District Court construed the broad allegations in Petitioner's favor and ruled that

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2. The original complaint read together with the "Supplement" is styled the "Amended Complaint" in the District Court's 1967 Opinion (Petitioner's Appendix A1).

the amended pleadings stated ". . . a claim of abuse of eminent domain proceedings. . . ." (Petitioner's Appendix A34). In coming to this conclusion, the District Court accepted Petitioner's characterization of this case as a *Foster*-type claim involving the use of the power of eminent domain. *Sayre v. United States,* 282 F. Supp. 175 (N.D. Ohio 1967) (A1-34). Thus, the court observed:

> "The amended complaint states that Cleveland initiated steps to appropriate properties of plaintiff's bankrupt." (A17).
>
> "In the present case eminent domain proceedings involving the properties of plaintiff's bankrupt, though apparently commenced in accordance with law, have never been accomplished." (A18).

After the District Court's order and opinion were issued, Respondent set out to test the "abuse of eminent domain" allegations which permitted Petitioner's claims to survive the motion to dismiss. Respondent propounded a series of interrogatories which, among other things, required Petitioner to specifically identify the properties alleged to have been "taken". Petitioner's answers to the interrogatories were checked against City records. Once this information was collated and analyzed, the stark fact emerged that no eminent domain proceedings involving the properties pertinent to this case had ever been authorized or commenced with regard to the urban renewal project described in Petitioner's pleadings.

The City thus filed a motion for summary judgment. By way of answers to interrogatories, affidavits and documents attached to the motion, the City demonstrated that the use and abuse of the power of eminent domain alleged in the pleadings did not occur. The facts set forth in the

papers filed in support of Respondent's motion were not contradicted. These facts showed that Council did not adopt a resolution determining it necessary to acquire the properties involved in the appeal below. Council did not adopt a resolution declaring its intention to appropriate the properties pertinent to this case. Although Petitioner averred that the City sent notices to it announcing the City's intention to take Petitioner's properties, the answers to interrogatories showed not one such notice was received with respect to the properties involved in this appeal. Finally, the uncontroverted evidence showed that no eminent domain proceedings had ever been authorized or filed against any of Petitioner's properties involved in the appeal to the Court below.

On December 18, 1972, the District Court issued its initial Memorandum and Order in part granting, and in part denying, Respondent's motion for summary judgment (Petitioner's Appendix A35-46).[3] From the District Court's decision adverse to Respondent involving Petitioner's unacquired properties located within the boundaries of the GNRP, Respondent obtained permission to appeal to the Court of Appeals. On March 14, 1974, the Court of Appeals unanimously reversed the District Court, holding that "there is no de facto taking of properties which have decreased in value because of an urban renewal project unless there is a physical invasion, damage or injury, or a restraint of some type, or action by the City to appropriate such properties." (Petitioner's Appendix A62).

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3. The summary judgment in Respondent's favor involved properties other than those considered in the appeal to the Court of Appeals. Petitioner did not appeal the District Court's judgment in Respondent's favor.

REASONS FOR DENYING THE WRIT

The holding of the Court of Appeals is consonant with the decisions of this Court. No decision of another circuit conflicts with the reasoning or holding below. Those decisions of the highest state courts which have dealt with the subject fully support the decision of the Court of Appeals. Granting certiorari in this case would be inappropriate.

I. The Decision Below Is in Harmony with the Decisions of This Court

Petitioner inaccurately states that "no decision or opinion of this Court" "was cited or relied upon" by the Court of Appeals and that this "Court has never pronounced the rule which the Court of Appeals asserts to be the law" (Petition at 7). To the contrary, the Court of Appeals cited four decisions of this Court in support of its holding (Petitioner's Appendix A61). As is shown below, this Court has consistently held that there is no "taking" of property in violation of the Constitution absent physical invasion or direct restraint on private property.

As early as *Transportation Company v. Chicago*, 99 U.S. 635 (1879), this Court held that governmental activities which do not directly encroach on private property are not a "taking" within the meaning of the fifth amendment even though the consequences of such acts may impair the use of the property.

In *Richards v. Washington Terminal Company*, 233 U.S. 546, 554 (1914) this Court held:

> "Any diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from

> the legalized nuisance, is held not to be a 'taking' within the constitutional provision."

See also *United States v. Sponenbarger*, 308 U.S. 256 (1939) (adoption of legislation which, if carried out, might result in the flooding of plaintiff's land does not constitute a taking); *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945) ("... damage alone gives courts no power to require compensation where there is no actual taking of property"); *United States v. Causby*, 328 U.S. 256, 262 (1946) ("[Taking] would be a definite exercise of complete dominion and control over the surface of the land"); and *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

Petitioner claims that *United States v. Cress*, 243 U.S. 316 (1917) supports its position. It does not. In *Cress*, the federal government had constructed locks and dams on two rivers in Kentucky to improve their navigation. This caused the waters of a non-navigable tributary to periodically flood some lands and to raise the level of another tributary to the extent that the current no longer would operate a mill. After determining under Kentucky law that a riparian owner has a property right in having the water flow past his property without artificial obstruction, this Court held that a destruction of that right and the flooding of lands required the payment of compensation. In coming to this conclusion, this Court carefully distinguished the direct invasion cases from the indirect damage cases, clearly pointing out that indirect damage does not rise to a constitutional claim:

> "These cases have no proper relation to cases such as *Gibson v. United States*, 166 U.S. 269, where no water was thrown back on claimant's land, and the damage was confined to an interference with the access thence to the navigable portion of the river; *Scranton v.*

> *Wheeler*, 179 U.S. 141, 153, which likewise had to do with the interruption of access from riparian land to a navigable channel; *Bedford v. United States*, 192 U.S. 217, 225 [etc.]. . . . *In each of these, there was no direct invasion of the lands of the claimants, the damages were altogether consequential, and the right to compensation was denied on that ground.*" 243 U.S. at 327 (Emphasis supplied.)

In cases dealing with the power of eminent domain, this Court has consistently held that governmental acts in planning and preparing for the filing of a condemnation action do not amount to the taking of property within the meaning of the Fifth Amendment. Thus in *Bauman v. Ross*, 167 U.S. 548, 596-598 (1897), this Court held that the legislative adoption of a map marking property for future appropriation did not constitute a "taking" even though the legislation directed that the map be filed of public record. In *Danforth v. United States*, 308 U.S. 271, 286 (1939), this Court held that the enactment of legislation approving and describing a public project and expressly authorizing the condemnation of specifically described property cannot be a taking. This Court thus clearly articulated the rationale applied by the Court of Appeals below:

> "A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." 308 U.S. at 285.

If no taking occurred in the above cases where the legislative authority unequivocally expressed an intention to appropriate, with much greater force it follows that no taking occurs where, as here, no preliminary legislative step was ever taken to condemn the properties considered below.

II. There Is No Conflict Between the Decisions of the Courts of Appeals

Petitioner has cited and relied on no decision of any of the Courts of Appeals. Petitioner does not contend that there is any conflict between the circuits. Respondent is aware of none.

Unanimity prevails in the circuits in holding that a *de facto* taking does not occur on facts short of physical invasion or direct legal restraint. *Batten v. United States,* 306 F.2d 580, 584 (10th Cir. 1962), *cert. denied,* 371 U.S. 955 (1963) ("Absent such physical invasion recovery has been uniformly denied"); *Nunnally v. United States,* 239 F.2d 521, 524 (4th Cir. 1956) ("But damages which are the incidental result of lawful governmental action, without any direct invasion of private property . . . do not constitute a taking under the Fifth Amendment"); *United States v. Meyer,* 113 F.2d 387, 398 (7th Cir.), *cert. denied,* 311 U.S. 706 (1940) (". . . mere damage to land not taken is not compensable as an act under the power of eminent domain"). See also *Sharpe v. United States,* 112 F. 893 (3rd Cir. 1902), *aff'd,* 191 U.S. 341 (1903); *Stover v. United States,* 332 F.2d 204 (9th Cir.), *cert. denied,* 379 U.S. 922 (1964); and *United States v. Certain Property Located in the Borough of Manhattan,* 374 F.2d 138 (2d Cir. 1967).

The Court of Appeals for the Sixth Circuit correctly articulated and applied the principle of law followed in the other circuits.

III. The Decision Below Is Fully Supported by Decisions of the Highest State Courts

The highest courts of many states have recently examined the claim that devastating pre-condemnation blight has resulted in the taking of private property without the

payment of compensation. In these cases the state courts have thoroughly considered the fundamental policy issues in order to determine whether precedent is relevant to current urban problems. The decisions of the state courts are in full accord with the decision below.

In *City of Buffalo v. J. W. Clement Company*, 28 N.Y.2d 241, 321 N.Y.S.2d 345 (1971), the Clement property was subject to various official notices, resolutions and ordinances indicating the city's intent to appropriate the property in conjunction with a waterfront redevelopment project. Eminent domain proceedings were not initiated, however, until many years after the city officially informed Clement that it would appropriate its property. In the intervening years, there was a general decline in property values within the redevelopment area. Clement vacated its plant and moved its business. The lower courts concluded that there was a *de facto* "taking" of the Clement property as of April 1, 1963, years prior to the filing of the eminent domain proceedings. The New York Court of Appeals reversed.

In its well-reasoned opinion, the court noted that there are two basic questions raised by the constitutional provisions in effect providing that private property shall not be taken for public use without just compensation. The first question is what is a "taking"; the second is what is "just compensation".

> "There is in fact a marked distinction between those cases which by reason of the cloud of condemnation, resulting in so-called condemnation blight, permit the claimant to establish his true value at the time of the taking but as if it had not been subjected to the debilitating effect of the threat of condemnation (citing cases), and those cases which go even further and

declare that the acts of the condemnor constitute a *de facto* taking long before the filing of the appropriation maps (citing cases). One is the product of acts which result, realistically speaking, in no less than an out and out appropriation of property, requiring in turn that the owner be fully compensated, while the other relates more properly to certain affirmative value-depressing acts on the part of the condemning authority, requiring only that evidence be received of value prior to such acts in an effort to arrive at just compensation." 28 N.Y.2d at 254, 321 N.Y.S.2d at 356.

Thus the court in *Clement* clearly recognized that in the context of *de jure* condemnation proceedings, some courts have resorted to the vocabulary of "taking" in approving a rule of valuation designed to achieve "just compensation".[4] But this looseness in language has not altered the uniformity in result. As the court in *Clement* observed:

"Despite this obvious confusion, it is clear that a *de facto* taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or legal interference with the owner's

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4. Illustrative are the cases of *Detroit v. Cassese*, 376 Mich. 311, 136 N.W.2d 896 (1965) and *Becos v. Masheter*, 15 Ohio St. 2d 15, 238 N.E.2d 548 (1968). Such cases, as well as the result in *Foster v. Herley*, 330 F.2d 87 (6th Cir. 1964) *on remand sub nom., Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968), *plaintiff's motion for clarification of opinion denied*, 423 F.2d 660 (6th Cir. 1970) are fully consistent with the rule of valuation recognized by this Court in *United States v. Miller*, 317 U.S. 369 (1943) and *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961) whereby changes in value (whether upward or downward) caused by the project or by the imminence of the condemnation action are excluded from consideration in order to arrive at just compensation.

> power of disposition of the property. On the other hand, 'condemnation blight' relates to the impact of certain acts upon the value of the subject property. It in no way imports a *taking* in the constitutional sense, but merely permits of a more realistic valuation of the condemned property in the subsequent *de jure* proceeding. In such a case, compensation shall be based on the value of the property at the time of the taking, as if it had not been subjected to the debilitating effect of a threatened condemnation." 28 N.Y.2d at 255, 321 N.Y.S.2d at 357.

Focusing on pre-condemnation activities carried out by a city in an urban redevelopment area where no condemnation action had been filed against the petitioner's lands, the Supreme Judicial Court of Massachusetts in *Cayon v. City of Chicopee*, 277 N.E.2d 116, 117 (Mass. 1971) held:

> "We believe that the allegations in the petition that the respondents' actions in announcing that the petitioner's land would be taken for urban renewal purposes and in failing to execute the takings, thereby decreasing the value of his property and depriving him of the opportunity to use or sell the land or pay the taxes levied upon it, do not disclose a 'taking' for which compensation must be paid."

And in *Wilson v. City of Long Branch*, 27 N.J. 360, 142 A.2d 837, *cert. denied*, 358 U.S. 873 (1958), the Supreme Court of New Jersey applied the rule employed by the Court below:

> "In effect [plaintiffs] say that a statute is contrary to our basic law which permits a municipality to impair the value of property and restrict its use by a declaration of blight without requiring compensation for such loss. But this is not a taking in the constitutional sense." 27 N.J. at 374, 142 A.2d at 844-845.

The California Supreme Court in *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 514 P.2d 111 (1973) held that the adoption of a plan showing plaintiff's property slated for acquisition and a subsequent refusal on the part of the city to issue building permits did not constitute a "taking" of property. Distinguishing its earlier decision in *Klopping v. City of Whittier*, 8 Cal. 3d 39, 500 P.2d 1345 (1972) in which condemnation proceedings were *initiated* against the property, the court said:

> "The instant case involves entirely different circumstances. The adoption of a general plan is several leagues short of a firm declaration of an intention to condemn property.
>
> * * * * *
>
> *"In order to state a cause of action for inverse condemnation, there must be an invasion or an appropriation of some valuable right which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury."* 10 Cal. 3d at 119-20.

See also Bakken v. State of Montana, 142 Mont. 166, 382 P.2d 550 (1963); and *Empire Construction, Inc. v. City of Tulsa*, 512 P.2d 119 (Okla.), *cert. denied*, 414 U.S. 1094 (1973).

The foregoing carefully considered decisions of the highest courts of the states of New York, New Jersey, Massachusetts, California, Montana and Oklahoma thus are in total accord with the decision of the Court of Appeals below.

CONCLUSION

The record below conclusively established that the legislative authority of the Respondent City never expressed an intention to appropriate Petitioner's properties for any purpose. The facts in the record showed that no preliminary legislative step was taken to even pave the way for a possible use of the eminent domain power with respect to such properties. Under such facts, the Court of Appeals correctly held that there was no "taking" of property in the constitutional sense. The petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE I. MEISEL
JAMES A. SMITH
ISAAC SCHULZ
1800 Union Commerce Bldg.
Cleveland, Ohio 44115
Counsel for Respondent

Of Counsel:

HERBERT R. WHITING
Director of Law

ROBERT JONES
Assistant Director of Law
213 City Hall
Cleveland, Ohio 44114